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# In The Supreme Court of the United States

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**EDWARD E. LOMBARD; ASA P. LOMBARD III; EDITH LOMBARD CASSICK; RUTH LOMBARD GOURLEY; FLORENCE LOMBARD BROWN; BARBARA LOMBARD BANUK; SUSAN LOMBARD BLACK; ALTON HORTE; CARLETON G. SMITH; BARBARA E. BAINES; VIRGINIA H. HART,**

*Petitioners,*

**v.**

**UNITED STATES,**

*Respondent.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the First Circuit err in essentially holding that the appointment of a guardian ad litem after the death of a plaintiff in a quiet title action trumps the due process requirement set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), for personal service to persons that the plaintiff, at the time he filed the action, knew had an interest in the property?

2. Did the United States Court of Appeals for the First Circuit err in failing to properly apply the full faith and credit doctrine when it failed to find that the County Quiet Title Court was without jurisdiction because the State Land Court had exclusive in rem jurisdiction since the identical case taken to the County Quiet Title Court was already pending in the State Land Court?

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## OPINIONS AND ORDERS BELOW

The November 30, 1998 ruling of the United States District Court for the District of Massachusetts denying the plaintiffs' motion to amend to assert an action to quiet title and granting the defendant's motion for summary judgment is reported at *Lombard v. United States*, 28 F. Supp. 2d 44 (D. Mass. 1998), and is set out in the Appendix at A-1. The October 26, 1999 decision of the United States Court of Appeals for the First Circuit vacating and remanding the District Court's decision is reported at *Lombard v. United States*, 194 F.3d 305 (1st Cir. 1999), and is set out in the Appendix at A-14. The August 28, 2002 ruling of the District Court granting the defendant's second motion for summary judgment is reported at *Lombard v. United States*, 2002 WL 1998245 (D. Mass. 2002), and is set out in the Appendix at A-30. The January 23, 2004 decision of the First Circuit affirming the District Court's August 28, 2002 ruling is set out in the Appendix at A-47. The April 2, 2004 Order of the United States Court of Appeals for the First Circuit denying the Plaintiffs-Appellants' Petition for Panel Rehearing is reported at *Lombard v. United States*, 356 F.3d 151 (1st Cir. 2004), and is set out in the Appendix at A-57.

## STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the District of Massachusetts, the court of first instance, was invoked pursuant to 28 U.S.C. § 1347 for the action under 28 U.S.C. § 2409 for partition of lands where the United States is one of the tenants in common and under 28 U.S.C. § 1346 for the quiet title claim pursuant to 28 U.S.C. § 2409a.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Order of the United States Court of Appeals for the First Circuit affirming the ruling of the United States District Court for the District of Massachusetts was entered on

January 23, 2004. The final judgment of the United States Court of Appeals for the First Circuit denying the Plaintiffs-Appellants' Petition for Panel Rehearing was rendered on April 2, 2004.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in every State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings may be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

The full faith and credit statute provides in relevant part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the

> same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

The governing Massachusetts statute provides, in pertinent parts:

> If, in a civil action in the supreme judicial or the superior court, or in the land court, to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto, it is sought to determine the claims or rights of persons unascertained, not in being, unknown or out of the commonwealth, or who cannot be actually served with process and made personally amenable to the judgment of the court, such persons may be made defendants and, if they are unascertained, not in being or unknown, may be described generally as the heirs or legal representatives of AB, or such persons as shall become heirs, devisees or appointees of CD, a living person, or persons claiming under AB. It shall be unnecessary for the maintenance of such action that the defendants shall have a claim or the possibility of a claim resting upon an instrument the cancellation or surrender of which would afford the relief desired; but it shall be sufficient that they claim or may claim by purchase, descent or otherwise, some right, title, interest or estate in the land which is the subject of the action and that their claim depends upon the construction of a written

instrument or cannot be met by the plaintiffs without the production of evidence. Two or more persons claiming to own separate and distinct parcels of land in the same county by titles derived from a common source, or two or more persons having separate and distinct interests in the same parcel, may join as plaintiffs in any action brought under this section.

Mass. Gen. Laws Ann. ch. 240, § 6.

If in such action the court finds that actual service cannot be, or has not been, made upon a defendant, it may at the request of the plaintiff order notice of the action to be posted in a conspicuous place on the land or to be published in a newspaper within or without the commonwealth, or both, or to be given in such other manner as it considers most effectual, and may also require personal notice to be given. Notice given under this section shall be constructive service on all the defendants.

M.G.L.A. ch. 240, § 7.

If, after notice has been given or served as provided in the preceding section and the time limited in such notice for the appearance of the defendants has expired, the court finds that there are or may be defendants not actually served with process within the commonwealth who have not appeared in the action, it may of its own motion, or on the representation of any party, appoint a guardian ad litem or next friend of any such defendant, and if any such

> defendants have or may have conflicting interests, it may appoint different guardians ad litem or next friends to represent them.

M.G.L.A. ch. 240, § 8.

> After all the defendants have been served with process or notified as provided in section seven and after the appointment of a guardian ad litem or next friend, if such appointment has been made, the court may proceed as though all defendants had been actually served with process. Such action shall be a proceeding in rem against the land, and a judgment establishing or declaring the validity, nature or extent of the plaintiff's title may be entered, and shall operate directly on the land and have the force of a release made by or on behalf of all defendants of all claims inconsistent with the title established or declared thereby. This and the four preceding sections shall not prevent the court from also exercising jurisdiction in personam against defendants actually served with process who are personally amenable to its judgments.

M.G.L.A. ch. 240, § 10.

## STATEMENT OF THE CASE

### Proceedings Below

Plaintiffs filed a partition action against the United States, pursuant to 28 U.S.C. § 2409, on or about April 4, 1997, claiming that they, as owners, and the government, as purchaser of a 40% interest in the land, are tenants in common of an 8.6-acre property located within the Cape Cod National

Seashore. (*See* A-1 to A-2.) On motions by both parties, the District Court, on November 30, 1998, denied the plaintiffs' motion for leave to amend to assert an action under 28 U.S.C. § 2409a to quiet title, concluding that amendment would be futile because the claim would be barred by the statute of limitations, and granted the defendant's motion for summary judgment. (*See* A-13.) On appeal to the First Circuit, the court, on October 26, 1999, vacated the District Court's judgment, finding that there were genuine issues of fact as to whether the quiet title action would be barred by the statute of limitations, and remanded. (A-28.) On remand, the District Court, by Memorandum and Order of August 28, 2002, concluded that it was obliged to give full faith and credit to an earlier state court determination of title in 1964 in favor of the government's predecessor in title, despite lack of personal notice to the plaintiffs of that action, finding that notice by publication and posting was not constitutionally defective. (A-42 to A-44.) On appeal, the First Circuit, on January 23, 2004, affirmed the District Court's decision, specifically finding that, even if the party who brought the earlier state action had wrongfully withheld knowledge of persons with adverse interests, the judgment in that case should not be invalidated where the state had adopted and followed a scheme as protective as that used in this case, that is, providing notice by publication and posting, in conjunction with appointment of a guardian ad litem. (A-54, A-56.) The First Circuit, by Order dated April 2, 2004, denied the Plaintiffs-Appellants' Petition for Panel Rehearing. (A-57.)

**Statement of Facts**

The property in dispute contains 8.6 acres and is located in Wellfleet, Barnstable County, Massachusetts, within the Cape Cod National Seashore as created by Congress under 16 U.S.C. § 459b. (A-3.) The property contained Thomas Lombard's homestead, which is no longer there, as well as the Lombard family graveyard, which is still on the property, in

which Thomas Lombard and other Lombards are buried.[1] (A-3.) Thomas Lombard was survived by five children, Edward Lombard, Richard S. Lombard, Benjamin F. Lombard, David C. Lombard, and Mary M. Lombard Cobb. (A-3.)

In 1924, David and Mary conveyed their two-fifth's undivided interests in the property to George K. Higgins. (A-3.) The deed mentions the "burial lot" and states that the property was "formerly owned by Thomas Lombard."

In 1935, Higgins brought a petition in the Massachusetts Land Court, Massachusetts Land Court Case No. 15795, to register and confirm title to about 150 acres of real estate, including the 8.6 acres at issue in this case, pursuant to Mass. Gen. Laws ch. 185. (A-3.) One of the Lombards appeared and objected to Higgins's Land Court petition. (A-3.) In order to obtain a Land Court Judgment as to the remaining 140 or so acres, Higgins severed the 8.6 acres to a second case, Massachusetts Land Court Case No. 15855. (A-4.) The Massachusetts Land Court retained jurisdiction over Case No. 15855 and the locus until November 1, 1976, when it entered a Judgment of Dismissal against George Higgins.[2] (A-75.)

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[1]The Lombard family cemetery is similar to the Jefferson family cemetery at Monticello; both the Thomas Jefferson and Thomas Lombard cemeteries are located on, and are part of, homesteads.

[2]The District Court pointed to evidence that there may have been an order in Land Court Case No. 15855 in 1958 for dismissal without prejudice. (A-59.) The case was not actually dismissed, however, and remained on the docket until it was dismissed for lack of prosecution in 1976. (A-75.)

Massachusetts law makes it clear that an *order* for

In 1961, the United States Department of Interior began to negotiate with Higgins for the purchase of various parcels of real estate, including the Lombard property at issue in this case. (A-4.) A title binder was prepared for the Government by a title insurance company in 1962. Paragraphs 7I and 7J showed the heirs of Thomas Lombard to be owners of the property and showed the property to contain the Lombard cemetery. (A-4, A-61.) During 1962, Higgins actively contacted various Lombard descendants, attempting unsuccessfully to persuade them to sell him their interests in the property. (A-77 to A-78.) In December of 1962, the title company took delivery of the deed of George Higgins's two-fifth's interest to the United States and recorded the deed at the Barnstable County Registry of Deeds.

On October 16, 1963, Higgins brought another proceeding, concerning the very same property that was the subject of Land Court Case No. 15855, this time in the Barnstable County Superior Court, Case No. 27434, to quiet

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dismissal is not a judgment of dismissal. *E.g.*, *Old Colony St. Ry. v. Thomas*, 205 Mass. 529, 539, 91 N.E. 1006, 1009 (1910) (where no final judgment or order had been entered in pursuance of the earlier order, it was still within the power of the court to deal with the case in any proper way); *White v. Gove*, 183 Mass. 333, 339-40, 67 N.E. 359, 362 (1903) (principle that court has no further power to deal with case after entry of a final judgment does not apply to an order for a decree, or to an order for a judgment at law, but is applicable only to the entry of the formal final decree or the final judgment); *see also Town of West Springfield v. Olympic Lounge, Inc.*, 45 Mass. App. Ct. 923, 700 N.E.2d 1198, 1199 (1998) (findings and order for judgment were not themselves an appealable judgment); *Koonce v. Aldo Realty Trust*, 8 Mass. App. Ct. 199, 199, 392 N.E.2d 549, 550 (1979) (where judgment had not been entered by lower court as required, appeal had to be dismissed).

title to the property. (A-5.) Higgins did not name individual Lombards that he knew to be current owners of the other three-fifth's interests, having just attempted to purchase their interests. Instead, he named Thomas Lombard, his heirs, and his devisees. (A-5, A-62.) Thomas having been dead for about 100 years, the Sheriff was unable to serve him and apparently made no effort to locate his heirs, who would have been easily ascertainable, given that Wellfleet was a community of only about 2,000 persons at that time. Notice was given by small-print publication on October 25, November 1, and November 8, 1963; notice by posting was effectuated on November 19, 1963; no personal service or service by mail to any living Lombard was made or attempted. (*See* A-67 to A-72.) Higgins died on February 19, 1964. (A-5.) On or about May 2, 1964, Katherine Higgins was substituted as petitioner, and the court appointed a guardian ad litem to represent the interests of unknown and unascertainable persons. (A-5.) Notwithstanding the fact that the identities of the Lombard owners would have been easily ascertainable,[3] the guardian's report stated that the persons to whom notice had been given (three abutting owners) were the only persons entitled to notice. Thereafter, the inevitable happened—a default judgment was entered on August 20, 1964 "against Thomas Lombard, his heirs and devisees." (A-73.)

In November 1976, the Massachusetts Land Court entered a Judgment of Dismissal against the petition of George Higgins in Land Court Case No. 15855. (A-75.) The Lombard owners had knowledge of the Land Court case because one of them had been served and had appeared in Case No. 15855. None of the Lombard owners, however, had any knowledge

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[3]The fact that Higgins knew who the Lombard owners were and their whereabouts, coupled with the small size of the town, makes it clear that the Lombard owners were easily ascertainable, even after Higgins's death.

of, or any reason to know about, the action or the judgment in Barnstable County Superior Court Case No. 27434. There was, therefore, nothing to indicate to the Lombard plaintiffs that their interest in the 8.6-acre property had been extinguished.

In April 1997, the Lombards, as tenants in common with the United States, filed a civil action in the United States District Court concerning locus, pursuant to 28 U.S.C. § 2409, for partition. (A-2.) They later moved to amend to add a quiet title action under 28 U.S.C. § 2409(a). (A-2.) The United States moved to dismiss or, in the alternative, for summary judgment. The Lombards also requested summary judgment that they have record title to a three-fifth's undivided interest in the property as tenants in common, based on an affidavit by a real estate title examiner showing that an examination of all relevant real estate records in Massachusetts revealed that Thomas Lombard deceased owning the locus, that the United States owned a two-fifth's undivided interest as tenant in common, and that the heirs of Thomas Lombard owned the remaining three-fifth's undivided interests as tenants in common.

Although the Lombards' motion was unopposed by the Government, the District Court granted the United States' first motion for summary judgment, on the ground that the District Court lacked jurisdiction, and denied the Lombards' unopposed motion. (A-13.) On appeal, the First Circuit found jurisdiction to exist and remanded the action to the District Court. (A-28 to A-29.)[4]

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[4]In its first decision, the First Circuit Panel held that the United States had failed to show that the Lombards knew of any exclusive adverse claim made by the United States within the 12-year period set out in 28 U.S.C. § 2409a(g), which subsumes the Lombards not knowing of the Barnstable County quiet title action.

After remand, the United States again filed a motion for summary judgment, this time requesting that the District Court give preclusive effect to the decision of the Barnstable County Superior Court in Case No. 27434. (A-30.) On August 28, 2002, the District Court granted the United States motion and again denied the Lombards' unopposed motion for summary judgment as to title based wholly on notice that it apparently misapprehended as having occurred after Higgins died. (A-42.) On January 23, 2004, the First Circuit affirmed the lower court's decision, specifically finding that the Lombards had received constitutionally adequate notice in Barnstable County Superior Court Case No. 27434, notwithstanding the fact that they did not receive personal service or service by mail, and without regard to whether Higgins, the plaintiff in that case, had actual or readily ascertainable knowledge of their identities and whereabouts, because the court had appointed a guardian ad litem to represent the interests of unknown or unascertainable parties in interest. (A-54.) The Lombards' Petition for Rehearing En Banc was denied April 2, 2004. (A-57.)

The plaintiffs are now requesting a Writ of Certiorari from this Court based on their belief that the decision and reasoning of the First Circuit is in conflict with Supreme Court precedent.

## ARGUMENT

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and in other cases decided both before and after *Mullane*, this Court has consistently required personal service or service by mail to every person who has a property interest in the subject of the action and who is reasonably ascertainable with due diligence. In writing its second opinion in this case, the Court of Appeals for the First Circuit acknowledged that its decision may constitute "precedential authority." The

court, without citing any case authority, federal or state, explained:

> But one facet of the matter is difficult and may have some precedential value. We confine our discussion to that issue, namely, whether the notice given under the Massachusetts statute was an adequate basis for the 1964 judgment.
>
> . . .
>
> The plaintiffs assert that Higgins—the person who instigated the 1963-64 quiet title action—knew that there were some descendants of Thomas Lombard living in Wellfleet who might claim an interest in the property, and Higgins deliberately chose not to give them personal notice. The evidence as to this is murky and was discounted by the government; but the district court accepted the possibility. So we will assume *arguendo* that the factual issue might bar summary judgment—if it were decisive. We conclude that in this case it is not.
>
> . . . .
>
> Where a state has adopted and followed a scheme as protective as that used in this case, we think the resulting judgment should not be invalidated by a different court even if a party to the original action wrongfully withheld private knowledge from the court.

*Lombard v. United States*, 356 F.3d 151, 154-56 (1st Cir. 2004).

The statute on which the First Circuit relied is a pre-*Mullane* law which, although it has not been substantively amended, has been brought in line with the constitutional standards outlined by this Court in *Mullane* and other cases through Massachusetts case law.[5] The First Circuit, more

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[5]Since the Supreme Court decisions on notice establish constitutional standards, state statutes and/or decisions to the contrary are clearly trumped. Although Massachusetts has not revised the applicable statutes since *Mullane*, its courts have adopted the constitutional standard, as they must, requiring personal service or service by mail, except in tax-taking cases involving land of low value. The current monetary ceiling on land of low value under Mass. Gen. Laws Ann. ch. 60, § 79 is $15,000. In 1963, it was $1,000. Since Higgins sold his interest in the 8.6-acre Lombard lot to the United States for $13,500, many multiples above the1962 ceiling, the District Court's reliance on *Hardy v. Jaeckle*, 371 Mass. 573, 580, 358 N.E.2d 769, 774 (1976), and *Robertson v. Town of Plymouth*, 18 Mass. App. Ct. 592, 594, 468 N.E.2d 1090, 1092 (1984), for the principle that reasonable diligence only requires examination of the contents of the local Registry of Deeds and local Registry of Probate is clearly misplaced—those cases involved low-value tax takings of vacant real estate under M.G.L.A. ch. 60, § 79, and the lower notice standard was justified by the fact that governments should not be required to spend more money looking for owners than the real estate is worth. Indeed, Massachusetts courts have felt compelled to comply with the requirement of personal service or mailing in other contexts. *See Christian v. Mooney*, 400 Mass. 753, 761, 511 N.E.2d 587 (1987) (how far municipality must search involves whether redemption of land is foreclosed in normal course or under procedure applicable to land of low value), *cert. denied*, 484 U.S. 1053 (1988); *Lamontagne v. Knightly*, 30 Mass. App. Ct. 647, 572 N.E.2d 1375, 1378, 1379 (1991).

importantly, in concluding that the plaintiff's knowledge and conduct in effecting service on interested persons is simply irrelevant to the rights of such interested persons so long as the state statute provides for notice by publication and posting and for appointment of a guardian ad litem, has impermissibly shifted the burden of naming known defendants away from the *plaintiff* and done away with this Court's mandate for personal notice to all known persons of known interest. It is obvious that, under the standards established by the First Circuit, a plaintiff may defeat the rights of persons of known interest simply by deliberately choosing not to give them personal notice, in person or by mail,[6] and then requesting notice by publication and/or posting and the appointment of a guardian.[7]

Unless this Court grants certiorari and reverses, the decision by the First Circuit in this case will, indeed, serve as precedent for dispensing with the requirement for personal service or service by mail to every person who has a property interest in the subject of an action and who is reasonably ascertainable with due diligence, contrary to this Court's decision in *Mullane*, and in other cases decided both before and after *Mullane*.

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[6]In terms of constitutional requirements, it should not matter whether the plaintiff's failure to give adequate notice was not cured because of the plaintiff's continued misconduct or because of his death.

[7]The First Circuit's decision in this case will determine the notice requirements for any property interest, whether in real estate, stock and bond funds, or otherwise, returning the law to that before *Mullane*, if not earlier.

## I. THE FIRST CIRCUIT COURT OF APPEALS ERRED BY DEPARTING FROM THE DOCTRINE OF *MULLANE v. CENTRAL HANOVER BANK & TRUST CO.* IN HOLDING THAT THE APPOINTMENT OF A GUARDIAN AD LITEM IN A QUIET TITLE ACTION SATISFIES THE DUE PROCESS REQUIREMENTS FOR NOTICE, EVEN IF THE PLAINTIFF, AT THE TIME HE FILED THE ACTION, DID NOT PROVIDE PERSONAL SERVICE TO PERSONS WHO HE KNEW HAD AN INTEREST IN THE PROPERTY.

There is no question that the constitutional requirement for due process is a flexible concept, the satisfaction of which is dependent upon the facts and circumstances at issue. In every circumstance, however, due process requires, at a minimum, notice and an opportunity to be heard. More specifically, with regard to notice, this Court has stated, as a general principle:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.

*Mullane*, 339 U.S. at 314. The Court has consistently required direct notice, by personal service or by mail, to all known and all reasonably ascertainable persons, holding that publication and posting are only permissible, as a secondary form of notice, when the proper defendants are unknown and unascertainable. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799-800 (1983) (and cases cited therein). Over the years, this Court has addressed the issue of notice in a variety

of contexts. Over and over, it has concluded that notice by publication and/or posting is generally insufficient, except as to unknown and not easily ascertainable persons.

In the context of condemnation, the Court has concluded that notice by publication is not enough as to a person whose name and address are known. *E.g., Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) (holding that notice of condemnation proceedings published in a newspaper and posted was insufficient to notify property owner when his name and address were readily ascertainable from tax rolls and deed records); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (holding that publishing notice of condemnation proceedings in a local newspaper was not sufficient to notify landowner, when the city knew landowner's name and name was on official records). Similarly, in the context of tax sales proceedings, the Court has concluded that notice by mail or other equally certain means is the minimum constitutional precondition to a proceeding that will adversely affect the property interests of any party. *Mennonite Board of Missions*, 462 U.S. at 800.

Over 50 years ago, this Court, in the context of an action involving an accounting of a common trust fund, made it clear that the existence of a guardian ad litem[8] was insufficient to satisfy the due process requirements as to interested persons whose identities are known or can be reasonably ascertained at the time the action is commenced. *Mullane*, 339 U.S. at 317-18. In invalidating the statutory notice provision in that case, the Court explained:

> The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances

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[8]In fact, in *Mullane*, there were two guardians.

> it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.
>
> . . . .
>
> We hold the notice of judicial settlement of accounts required by the New York Banking Law § 100-c(12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights.

*Id.* at 319-20.

In an even earlier case, in the exact same context as the present one, the Court clearly recognized that due process principles require plaintiffs in quiet title actions to make *diligent efforts* to ensure adequate notice to all potential defendants. *American Land Co. v. Zeiss*, 219 U.S. 47, 66 (1911). In that case, the Court reviewed the constitutionality of a 1906 California statute enacted in response to conditions caused by the "great calamity of earthquake and fire" in San Francisco to provide for quieting of title to real property in case of the loss or destruction of public records. *Id.* at 48-49. The statute, which incorporated features of the Torrens registration system, had previously been held constitutional by

California's highest court in *Title Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 P. 356 (1906). This Court held that the statute satisfied the due process criteria for notice because it imposed a duty on the person seeking to quiet title to make a diligent inquiry to ascertain the names of all claimants, which demonstrated "the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of the unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested." *American Land Co.*, 219 U.S. at 66.

Importantly, the duty of diligent inquiry is properly on the party seeking the court's assistance—not on the court. *See, e.g., American Land Co.*, 219 U.S. at 66 (diligent inquiry duty on person seeking to quiet title); *Lobato v. Taylor*, 70 P.3d 1152, 1161 (Colo.) (diligent inquiry duty on applicant for land registration), *cert. denied*, 124 S. Ct. 922 (2003); *Rael v. Taylor*, 876 P.2d 1210, 1224-27 (Colo. 1994) (same). As the Court clarified in *Mennonite Board of Missions*, furthermore, due process requirements for notice are not dependent on whether the interested parties themselves have means at their disposal to discover that a proceeding involving their interests has been, or is likely to be, initiated. 462 U.S. at 799-800. Rather, due process requires the person who seeks the court's assistance to make sure that all interested parties whose identities and whereabouts are ascertainable with due diligence are properly notified of the action.

As the Colorado court explained in the land registration context, which is directly analogous to the quiet title context,[9]

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[9]The registration process under the Torrens Act is a judicial proceeding essentially similar to a quiet title action. In

> applicants must act with reasonable diligence to ascertain the names of persons who claim an interest in the property subject to the proceedings. The test of reasonable diligence, as established by *Mullane* and its progeny, is an objective test: the conduct a reasonably prudent applicant would undertake under all circumstances known or reasonably discoverable by the applicant at the time the application is filed to ensure that interested parties will be identified and served as named defendants.

*Rael*, 876 P.2d at 1226-27. Due process requirements, furthermore, do not evaporate merely because those seeking the court's assistance willfully, or even negligently, close their eyes to information readily ascertainable—certainly they do not evaporate because a plaintiff purposely fails to provide adequate notice to persons he affirmatively knows have an interest. *See, e.g., id.* at 1226 (and cases from other jurisdictions cited therein). The District Court, in relying on the lack of evidence that Katherine Higgins or the guardian ad litem knew or could have reasonably ascertained the identities of the descendants, apparently either misapprehended the timing of Higgins's death or erroneously believed that his death somehow erased the notice requirements applicable when he filed the action. The First Circuit, in affirming the decision, explicitly concluded that the notice provided was constitutionally sufficient even if Higgins failed to provide notice to known individuals with known interests.

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the former, the applicant states the nature of the title and all charges and encumbrances upon it. At the completion of the registration process, a certificate of title is produced, which becomes conclusive of the status of the title to registered land.

This Court, however, has never found that anything less than personal notice reasonably calculated to reach known interested persons suffices. To the contrary, as already stated, the Court has consistently required personal notice, either in person or by mail, to known persons with known interests. Therefore, where a plaintiff knows or could with due diligence ascertain the identities of persons with a property interest in the subject of the litigation, but does not give notice in person or by mail to such persons within the time provided, the notice is constitutionally inadequate. In the present case, as the District Court acknowledged, the evidence clearly supports a finding that the identity and the residence of at least some of the Lombard descendants were known or reasonably ascertainable by Higgins, given the court's statement that

> the evidence supports Plaintiffs' contention that Higgins contacted various Lombards to persuade them to sign over their interests in the locus.

*Lombard v. United States*, 2002 WL 1998245, at *6 (D. Mass. 2002), *aff'd*, 356 F.3d 151 (1st Cir. 2004). In fact, the evidence shows that Higgins was in actual contact with at least some of the Lombard descendants, attempting to purchase their interests, just before he filed the quiet title action.

In essence, the First Circuit's decision in this case amounts to a holding that the constitutional requirement for notice can be defeated by the perpetuation of a fraud upon the court[10] by a plaintiff. In the present case, Higgins had just

---

[10]As the courts have found, the intentional failure to name and give notice to known interested persons constitutes a fraud upon the court. *See, e.g., Baker v. Kemp*, 299 Mass. 490, 490, 13 N.E.2d 380, 381 (1938) (where respondents and

been in contact with some of the Lombard descendants in 1962, attempting to purchase their interests, and was very much alive in 1963 when the quiet title action was filed, when notice by publication and posting was given, and even when the time for service of notice expired. The only reasonable inference that can be drawn from the facts is that Higgins deliberately chose not to name and serve the Lombard descendants. He failed to name any living Lombard, notwithstanding that he not only knew of them but also knew at least some of them personally. His object in failing to name known interested persons was specifically to obtain clear title to property that he knew full well he owned only a 40% interest in, for the sole purpose of conveying that property to another party, the United States, which had held off on the purchase because of the title problem. The result in this case is, in fact, the very kind of circumstance that the constitutional requirements for notice are intended to prevent.

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examiner of titles to whom the petition for registration of title to land in Wellfleet was referred knew that petitioner for review made claim to part of land, but failed to disclose that fact to the land court, so that petitioner for review had no notice of the proceedings until after the decree of registration, conduct of respondents was a fraud in law); *Child v. Clark*, 231 Mass. 3, 5-6, 120 N.E. 77, 77 (1918) (where person controlling entire proceedings in probate court intentionally refrained from giving any notice, formal or otherwise, to the petitioners whom he was depriving of legal title to their land and intentionally refrained from informing probate court as to state of the title, it would be a reproach to law to allow such an injustice to be perpetrated by means of a fraud).

## II. THE FIRST CIRCUIT COURT OF APPEALS ERRED BY FAILING TO APPLY FULL FAITH AND CREDIT TO STATE LAW, UNDER WHICH THE DECISION RELIED ON WOULD HAVE BEEN VOID BECAUSE THE COUNTY QUIET TITLE COURT, WHICH ISSUED THE DECISION, WAS WITHOUT JURISDICTION SINCE PROPER NOTICE WAS NOT GIVEN TO ALL INTERESTED PERSONS AND SINCE THE IDENTICAL CASE WAS ALREADY PENDING BEFORE THE STATE LAND COURT, WHICH HAD EXCLUSIVE IN REM JURISDICTION OVER THE MATTER.

The First Circuit, based on its conclusion that notice was adequate in Case No. 27434, gave preclusive effect to the 1964 judgment of the Barnstable County Superior Court in that case. As this Court has made clear, however,

> [t]he full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's judicial proceedings as would the courts of the State rendering the judgment.

*Dean Whitter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985). The federal courts should not have given effect to Barnstable County Superior Court Case No. 27434 because, under Massachusetts law, the judgment in that case was void based on the fact that the deciding court had neither personal jurisdiction over all the parties nor in rem jurisdiction over the property.

### A. Personal Jurisdiction

Under Massachusetts law, it is firmly established that

> [a] judgment is void if the court from which it issues lacked jurisdiction over the parties, lacked jurisdiction over the subject matter, or failed to provide due process of law.

*Harris v. Sannella*, 400 Mass. 392, 395, 509 N.E.2d 916, 918 (1987) (citing *United States v. 119.67 Acres of Land*, 663 F.2d 1328, 1331 (5th Cir. 1981)). In fact, under state rules,

> [a] judge has no discretion to deny a request for relief from judgment . . . where it is shown that the judgment was entered by a court against a person over whom the court lacked personal jurisdiction. See *Bowers v. Board of Appeals of Marshfield*, 16 Mass.App.Ct. 29, 31, 448 N.E.2d 1293 (1983), and cases and authorities therein cited.

*Colley v. Benson, Young & Downs Insurance Agency, Inc.*, 42 Mass. App. Ct. 527, 533, 678 N.E.2d 440, 444 (1997) (citing Mass. R. Civ. P. 60(b)(4)).

This Court has consistently held that a judgment entered without constitutionally adequate notice violates the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Mullane*, 339 U.S. at 314. As explained *supra*, under the facts and circumstances of this case, notice by publication and posting was constitutionally inadequate, notwithstanding the appointment of a guardian ad litem, and individual notice, either in person or by mail, was required. It is undisputed that in Barnstable County Superior Court Case No. 27434 there was no personal service or service by mail on the Lombards.

Under Massachusetts law, therefore, the decision of the Barnstable County Superior Court in Quiet Title Case No. 27434 is void for lack of personal jurisdiction, based on inadequate notice, and should not have been given preclusive effect by the federal courts.

### B. In Rem Jurisdiction

Under Massachusetts law, jurisdiction, as between courts having concurrent jurisdiction over the subject matter, is with the court which first acquires jurisdiction and remains exclusively with that court to the end of the matter. *E.g.*, *Mayone v. Municipal Court of City of Boston*, 335 Mass. 717, 721, 142 N.E.2d 383, 385-86 (1957); *White v. White*, 322 Mass. 461, 465, 78 N.E.2d 100, 103 (1948); *Old Colony Trust Co. v. Segal*, 280 Mass. 212, 214-15, 182 N.E. 578, 579 (1932). Principles of comity, furthermore, underlie the well-established doctrine that only one court may exercise in rem jurisdiction over property at a time. *United States v. One Black 1999 Ford Crown Victoria LX*, 118 F. Supp. 2d 115, 118 (D. Mass. 2000). As Massachusetts' highest court explained in an analogous case,

> [w]here different courts of the same sovereign power have concurrent jurisdiction of the same causes, the one whose jurisdiction is first duly invoked has authority paramount over other courts. It acquires exclusive jurisdiction over the subject and so long as the proceeding is pending before it no action can be taken by any other court. Since the causes described in the petition have all been put in litigation in the Superior Court, prior to the filing of the present petition, that court acquired and retains jurisdiction exclusive of the Probate Court.

*Old Colony Trust*, 280 Mass. at 214-15, 182 N.E. at 579 (citations omitted).

In the present case, the Massachusetts Land Court, by virtue of the 1935 filing by Higgins of Case No. 15855, had exclusive jurisdiction over the res until 1976, when that case was finally terminated, trumping the jurisdiction which the Barnstable County Superior Court would otherwise have acquired with the 1963 filing by Higgins of Case No. 27434. The Massachusetts Land Court was the first court to assume jurisdiction of the property in dispute, thereby activating its exclusive in rem jurisdiction. So long as the Land Court maintained its jurisdiction over the property, the Barnstable County Superior Court could not properly obtain jurisdiction to act in rem with respect to that property.

Under Massachusetts law, therefore, the decision of the Barnstable County Superior Court in Quiet Title Case No. 27434 is void both for lack of personal jurisdiction, based on inadequate notice, and for lack of in rem jurisdiction, based on the fact that the same case was already pending in another state court.

## CONCLUSION

For all of the foregoing reasons and based on the authorities presented, the Petitioners request this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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No._____

# In The Supreme Court of the United States

EDWARD E. LOMBARD; ASA P. LOMBARD III; EDITH LOMBARD CASSICK; RUTH LOMBARD GOURLEY; FLORENCE LOMBARD BROWN; BARBARA LOMBARD BANUK; SUSAN LOMBARD BLACK; ALTON HORTE; CARLETON G. SMITH; BARBARA E. BAINES; VIRGINIA H. HART,

*Petitioners,*

v.

UNITED STATES,

*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## APPENDIX

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United States District Court,
D. Massachusetts.

Edward E. LOMBARD, Asa P. Lombard, III, Edith Lombard Cassick, Ruth Lombard Gourley, Florence Lombard Brown, Barbara Lombard Banuk, Susan Lombard Black, and Alton Horte, Plaintiffs,

v.

UNITED STATES of America, Defendant.

**No. Civ.A. 97-10725-PBS.**

Nov. 30, 1998.

Claimants of title to land, located within Cape Cod National Seashore, brought partition action claiming that United States and they were tenants in common. United States moved for summary judgment, and claimants moved for leave to amend complaint to assert action to quiet title. The District Court, Saris, J., held that: (1) dispute as to claimants' title precluded partition action, and (2) equitable tolling of twelve year limitations period for claimants to bring quiet title action was not warranted.

Plaintiffs' motion denied, and defendant's motion granted.

**MEMORANDUM AND ORDER**

SARIS, District Judge.

## *INTRODUCTION*

This case concerns a belated claim to title to land on Bound Brook Island, located within the Cape Cod National Seashore. The plaintiffs, Edward Lombard and his siblings, cousins, and nieces, have filed a partition action against the United States pursuant to 28 U.S.C. § 2409, claiming that the government and they are tenants in common. The government, which purchased the property in the early 1960s, moves for summary judgment on the ground that there is a real and substantial dispute as to plaintiffs' interest in the property, which removes this action from the scope of the partition statute.

Alternatively, plaintiffs seek leave to amend the complaint to assert an action to quiet title pursuant to 28 U.S.C. § 2409a. The government contends that such an amendment would be futile because the action is barred by the twelve-year statute of limitations. Plaintiffs have also filed a motion for summary judgment asking this Court to enter a judgment that plaintiffs have record title.[1] After hearing, this Court ***ALLOWS*** defendant's motion for summary judgment and ***DENIES*** plaintiffs' motion.

## I. *BACKGROUND*

Viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor, the Court treats the following material facts

---

[1]Plaintiff Alton Horte, age 89, did not join in this motion for summary judgment because he was unable to furnish genealogical information to the title examiner. The Court allowed three additional descendants to intervene as plaintiffs: Charleton E. Smith, Barbara E. Baines, and Virginia H. Hart.

as undisputed. *See Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 36 (1st Cir.1995).

The Lombard family has its roots deep in the sands of Cape Cod. Thomas Lombard (whose grandfather was with General Washington at Valley Forge) owned the Bound Brook Island real estate until his death in 1873. He was survived by five children, Edward Lombard, Richard S. Lombard, Benjamin F. Lombard, David C. Lombard, and Mary M. Lombard Cobb. The plaintiffs are descendants of Richard S. Lombard and Edward Lombard, two of the five children. At the time of Thomas Lombard's death, the property contained his homestead, which no longer exists. Completely surrounded by the disputed property is a Lombard family cemetery still in existence today.

In 1924, David C. Lombard and Mary M. Lombard Cobb conveyed the Brook Bound Island property to George Higgins, as evidenced by the deed recorded on October 31, 1924, in Barnstable County. Excluded from the sale was the family cemetery and access thereto.

In 1935, George Higgins filed a petition with the Massachusetts Land Court (Case No. 15795) to register and confirm his title to seven parcels of land, aggregating approximately 145 acres in the Brook Bound Island area of North Wellfleet. Included in that land were the 8.7 acres on Brook Bound Island purchased from David Lombard and Mary Lombard Cobb. Henry Lombard, the son of Benjamin F. Lombard and grandson of Thomas Lombard, filed an answer in the Land Court case claiming that his father had a right, title, or interest in the Lombard Lot that was never released, and that "as he is an heir of said Benjamin Lombard, he therefore holds an interest in said Lot, which interest he wishes to be adjudicated by this Court."

Subsequently, the Land Court judge wrote that there was an "infirmity for which I have no remedy to suggest at present by reason of the fact that only two of the four people presumably claiming under one Thomas Lombard have conveyed to the petition in 1924." He suggested that Higgins' counsel procure an affidavit from David Lombard. David Lombard provided such an affidavit on April 19, 1935, claiming that he was the only one in the family who lived in Wellfleet, cared for the property, or claimed an interest in it. After Henry Lombard's opposition was filed, Higgins moved the court to sever the "Lombard Lot," consisting of the 8.7 acres, to another case. The disputed property was then assigned Registration No. 15855. The action was marked "inactive" on June 4, 1957, and ordered dismissed without prejudice on June 5, 1958. The docket reflected only the marking of "inactive" in 1957 and not the order of dismissal in 1958. Perhaps because of the docketing glitch, the case remained inactive on the docket for another twenty years. A judgment of dismissal was issued for lack of prosecution on November 1, 1976.

Beginning in 1961, the United States started acquiring land to form the Cape Cod National Seashore, as authorized by the Cape Cod National Seashore Act of August 7, 1961, Pub.L. No. 87-126, 75 Stat. 284 (codified at 16 U.S.C. §§ 459b to 459b-8). In 1962, the United States, through its Department of Interior and National Park Service, negotiated to purchase several pieces of property from George Higgins and his wife, including the 8.7 acres formerly owned by Thomas Lombard, which the government designated as Tract 25W-4011. Inside this tract is the Lombard family cemetery (Tract 25-5729), which continues to be owned by plaintiffs, who also possess a right of way across Tract 25W-4011 in order to reach the cemetery.

A Preliminary Certificate and Binder was prepared on December 19, 1962, by Home Title Guarantee Company. The

title examination included as exceptions to the certification the "persons claiming under the heirs of Thomas Lombard except as to David Lombard and Mary M. Cobb" and the Lombard burial ground located within the property. An appraisal determined that the property was completely unimproved except for the Lombard family cemetery. The United States took title from Higgins on December 28, 1962, and the deed was recorded in Barnstable County on December 31, 1962.

In 1963, Higgins filed an action to quiet title pursuant to Mass.Gen.L. ch. 240, §§ 6-10, in Barnstable County (Equity No. 27434). The respondents included "Thomas Lombard" and "his Heirs and Devisees." A citation was issued to Thomas Lombard by the court on October 16, 1963. The Deputy Sheriff certified that service was made, pursuant to Mass.Gen.L. ch. 240, § 7, by publication in *The Cape Cod Standard Times* on October 25, November 1, and November 8, 1963, and that the citation was posted both in the Barnstable County Registry of Deeds and on the property.

George Higgins died on February 19, 1964, and his wife, Katherine Higgins, was substituted as petitioner in the quiet title action. Upon her request for the appointment of a guardian ad litem, pursuant to Mass.Gen.L. ch. 240, § 8, the court appointed James H. Quirk, Esq., on May 11, 1964. In his report to the court, Quirk confirmed George Higgins' ownership interest through affidavits of adverse possession from three local residents identified by the government. The affidavits stated that Higgins had been in actual possession of the property for thirty-five years, that he did not recognize anyone as having any claims to a property interest, that he paid real estate taxes during his ownership, and that he exercised acts of ownership. On August 20, 1964, the Barnstable Superior Court issued a Final Decree in Equity Action No. 27434, confirming title to the property in Katherine F. Higgins "free and clear of all liens and encumbrances except the rights of the Lombard family in the Burial Lot on said

premises and a right of way or access thereto from the public road over the remaining land of said Katherine Higgins." After the Superior Court had established clear title, the United States paid Katherine Higgins for the property pursuant to their agreement.

The Lombard family has continued to visit the cemetery throughout the years. At some point prior to September 1977, the Forest Service gated the road formerly used by the Lombards to access the cemetery. Upon their request, a key was provided. Later, the road was allowed to revegetate, and vehicle access was restricted. Many of the plaintiffs recall childhood picnics and blueberry picking on the land surrounding the cemetery.

On April 4, 1997, plaintiffs filed the present action to partition the Brook Bound Island property pursuant to 28 U.S.C. § 2409.

## II. *DISCUSSION*

A motion for summary judgment must be allowed if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the non- moving party." *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir.1988) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). All reasonable inferences must be drawn in favor of the non-moving party, but "those inferences must flow rationally from the underlying facts; that is, a suggested inference must ascend to what common sense and human experience indicates is an acceptable level of probability." *Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st.Cir.1995) (citing

*National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 743 (1st Cir.1995)). "Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir.1995) (quoting *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505).

A. *Partition Action*

The government argues that the order of the Barnstable County Superior Court quieting the title of George and Katherine Higgins creates a title dispute that takes this action beyond the scope of 28 U.S.C. § 2409. Plaintiffs brought this action pursuant to 28 U.S.C. § 2409, which provides:

> Any civil action by any tenant in common or joint tenant owning an individual interest in lands, where the United States is one of such tenants in common or joint tenants, against the United States alone or against the United States and any other of such owners, shall proceed, and be determined, in the same manner as would a similar action between private persons.

This Court has original jurisdiction over such actions.[2] Section 2409 "is confined to those cases in which the plaintiff's title is undisputed." *Stanton v. United States*, 434 F.2d 1273, 1276-77 (5th Cir.1970) (dismissing a § 2409 claim to tenancy in

---

[2]"The district courts shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants." 28 U.S.C. § 1347.

common with the United States where plaintiffs claimed that they owned an undivided interest by virtue of interstate succession and possession in fact). "[T]he partition statute is unavailable where a determination of a dispute as to plaintiff's interest in property must be made as a predicate for the partition claim." *Stubbs v. United States*, 620 F.2d 775, 782 (10th Cir.1980). Where there is a substantial dispute as to title, a plaintiff must first file a quiet title action pursuant to 28 U.S.C. § 2409a. *See id.* 620 F.2d at 783.

Plaintiffs argue that the Superior Court judgment is void because the Land Court still had exclusive subject matter jurisdiction in 1963, given that the Land Court case (No. 15795) was marked "inactive" and not entered on the docket as dismissed until November 1, 1976. As relief, they ask this Court to enter judgment declaring that the 1963 Barnstable order is unenforceable for lack of subject matter jurisdiction in the Superior Court.[3] Alternatively, plaintiffs argue that the order is unenforceable because there was inadequate notice to the Lombard heirs. The government retorts that because final judgment was entered thirty-five years ago, and no appeal was taken, the only appropriate vehicle for seeking relief from the judgment is Mass.R.Civ.P. 60(b)(4). It adds that the notice met statutory requirements. I need not enter this thicket. Because plaintiffs' claim of tenancy in common with the government is far from clear and undisputed, § 2409 does not provide a cause of action to partition the property. Accordingly, this Court lacks subject matter jurisdiction under 28 U.S.C. § 1347.

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[3]Actually, while I don't have to resolve the matter, it appears from the Court pleadings that the Land Court action was ordered dismissed without prejudice in 1958.

B. *Quiet Title Action*

After argument on the motions for summary judgment, plaintiffs filed a motion to amend the complaint to add additional grounds for the Court's jurisdiction. To the extent that plaintiffs seek to assert jurisdiction under the Quiet Title Act, 28 U.S.C. §§ 2409a and 1346(f), the Court ***DENIES*** the motion as futile because the action is time-barred. With respect to the other proposed amendments, the motion to amend is also denied as untimely.

Section 2409a provides that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." This Court has exclusive original jurisdiction over quiet title actions.[4] The quiet title statute contains the following statute of limitations:

> Any civil action under this section . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g). The Supreme Court has recently described the strong policy concerns underpinning the statute of limitations: "It is of special importance that landowners know with certainty what their rights are, and the period

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[4]"The district courts shall have exclusive original jurisdiction of civil actions under § 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C. § 1346(f).

during which those rights may be subject to challenge." *United States v. Beggerly*, 524 U.S. 38, ----, 118 S.Ct. 1862, 1868, 141 L.Ed.2d 32 (1998) (declining to extend this already "generous" statute of limitations by equitable Tolling). Because sovereign immunity is involved, there must be "strict compliance with the requirement that any action must be commenced within twelve years of its accrual." *Economic Dev. and Indus. Corp. v. United States*, 720 F.2d 1, 3 (1st Cir.1983) (citing *Block v. North Dakota*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983)).

The inquiry whether the plaintiffs should have known of the United States' adverse interest is governed by "a test of reasonableness." *Patterson v. Buffalo Nat'l River*, 76 F.3d 221, 224 (8th Cir.1996) (citing *State of North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Block*, 789 F.2d 1308, 1312 (8th Cir.1986)). "Section 2409a does not require that the plaintiff have knowledge of the full contours of the Government's claim before the action accrues. Rather, all that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff." *D.C. Transit Sys., Inc. v. United States*, 531 F.Supp. 808, 811 (D.D.C.1982) (citing *United States v. Bedford Assocs.*, 657 F.2d 1300, 1316 & n. 16 (2d Cir.1981)). "If a claimant asserts fee title to disputed property, notice of a government claim that creates even a cloud on that title may be sufficient to trigger the limitations period." *Michel v. United States*, 65 F.3d 130, 132 (9th Cir.1995) (citing *California v. Yuba Goldfields*, 752 F.2d 393, 394-97 (9th Cir.1985)).

Plaintiffs argue that the twelve-year statute of limitations does not begin to run until the plaintiffs knew or should have known that the United States had begun to assert an interest adverse to the Lombards' sixty-percent interest, not when they knew that the government had acquired a forty-percent interest. Although plaintiffs concede that they can be charged with knowledge of the United States' *common* interest in the property with their own, they insist that none

were aware of the government's exclusive *adverse* interest until the commencement of this suit.

Here, the undisputed evidence in the record is that most of the plaintiffs have believed for decades that David Lombard had stolen the family birthright and sold it to Higgins. Edward E. Lombard, Asa P. Lombard, Jr., Edith Lombard Cassick, Alton Horte, and Ruth Lombard Gourley testified that they knew for over twelve years that David Lombard and Mary Lombard Cobb had conveyed plaintiffs' interest to George Higgins. Edward Lombard concedes that he knew in the 1950s that the property had been conveyed to Higgins. (Dep. Tr. at 12.) Edith Lombard Cassick has believed since the 1960s that David Lombard and Mary Cobb Lombard "did wrong by [her] grandmother" by stealing the Bound Brook Island property and selling it to Higgins. (Dep. Tr. at 9, 13-15.) In fact, Edith Cassick remembers that Higgins tried to persuade her father, Asa Lombard, and another uncle to sell their claimed property interest to him in the 1960s, but they refused. (Dep. Tr. at 24.) Alton Horte testified that Asa Lombard, Jr., and he talked to an attorney twenty years ago when they learned that David Lombard had conveyed the property without notice. (Dep. Tr. at 14.) Ruth Lombard Gourley testified that she had known about the conveyance to Higgins since she was a child. (Dep. Tr. at 12.)

Three plaintiffs rest in a different procedural posture. Florence Lombard Brown (Edward's sister who lives in California) and Barbara Lombard Banuk profess lack of knowledge of any conveyance. Brown testified that she relied on her brother to handle any matters relating to the property. (Dep. Tr. at 14.) The record before the Court is sparser with respect to Banuk and Susan Lombard Black, except that they occasionally visited the cemetery. In light of the widespread family knowledge of the sale over such a long period of time, they could easily have learned the status of the property by making inquiry.

Several of the plaintiffs, including Edith Lombard Cassick, Edward Lombard, Asa Lombard, III, Barbara Lombard Banuk, and Susan Lombard Black, recall learning of the Cape Cod National Seashore in the 1960s, and most knew that the United States had acquired the Brook Bound Island property for that purpose. Many of the plaintiffs (i.e., Cassick, Asa Lombard, Edward Lombard, Banuk) knew that the government was responsible for a locked gate that prevented access to the cemetery, and that the Park Service later allowed trees to grow in the path. Edward Lombard recalls "complaining bitterly to [the National Seashore] about their closing the road and shutting it off from us, so we had no access to it." (Dep. Tr. at 25.) On September 12, 1997, Asa Lombard sent a peremptory letter to the superintendent of the National Seashore complaining about the barrier at the entrance of the access road, demanding removal of the barrier or a key to the lock, and demanding that the government clean out the road to the cemetery.

Plaintiffs admit that they have not paid property taxes on the land surrounding the family cemetery, have not maintained or improved the surrounding land in any way, have not possessed the land, and have not contacted the Park Service or the Town of Wellfleet about their interest in the Brook Bound Island property. At most, they have occasionally visited the family cemetery, picked blueberries, and had picnics on the adjacent property.

Because the Lombard descendants have long known that Higgins claimed an interest adverse to theirs and that the United States purchased the property from him when developing the Cape Cod National Seashore, they reasonably should have known for well over twelve years of the United States' adverse claim to the property surrounding the family burial plot.

At oral argument, plaintiffs contended that the key to their argument is the evidence that the government gave them a key to get onto the property. However, provision of that key to provide access reflects a recognition of plaintiffs' recorded right of way to gain access to the cemetery, not a concession of tenancy in common to the entire property. Because plaintiffs are seeking a right to possession of the property, not a right to an easement to the cemetery, the cases they rely on are inapposite. *See Werner v. United States*, 9 F.3d 1514, 1518 (11th Cir.1993) (holding that landowners' claim to an easement accrued when they were denied access to a road, rather than when they learned that the government held title); *Patterson*, 76 F.3d at 224 (holding that a cause of action accrued when plaintiffs' were denied access to the roadway); *Michel*, 65 F.3d at 131-32 (holding that a claim accrued when the United States denied landowners use of a roadway for access to their property, rather than when the landowners became aware of the government's possessory interest).

## *ORDER*

The United States' motion for summary judgment (Docket 15) is hereby ***ALLOWED*** with respect to the plaintiffs and the plaintiff-intervenors.[5] The motion of Plaintiffs Edward E. Lombard et al. for summary judgment as to Title (Docket 17) is **DENIED.**

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[5]The plaintiff-intervenors never opposed the government's motion for summary judgment as to them.

United States Court of Appeals,
First Circuit.

Edward E. LOMBARD, Asa P. Lombard, III, Edith Lombard Cassick, Ruth Lombard Gourley, Florence Lombard Brown, Barbara Lombard Banuk, Susan Lombard Black, Alton Horte, Barbara Baines, Virginia H. Hart, Carleton G. Smith, Plaintiffs,

Appellants, Robert D. Lombard, Frankland W.L. Miles, Jr., John Grother Miles, Tagalie L. Lombard, Appellants,

v.

UNITED STATES of America,
Defendant, Appellee.

**No. 99-1108.**

Heard Sept. 10, 1999.
Decided Oct. 26, 1999.

Claimants of title to land located within Cape Cod National Seashore brought partition action, claiming that United States and they were tenants in common. United States moved for summary judgment, and claimants moved for leave to amend complaint to assert claim under Quiet Title Act. The United States District Court for the District of Massachusetts, Patti B. Saris, J., denied claimants' motion to amend and granted government's motion for summary judgment, 28 F.Supp.2d 44. Claimants appealed. The Court of Appeals, Boudin, Circuit Judge, held that: (1) genuine issues existed as to whether claimants knew 12 years before filing suit that government was claiming ownership interest in lot, and (2) state court's dismissal of prior action to register and confirm

title to lot in name of United States' grantor did not, under Full Faith and Credit Statute, require entry of judgment in favor of claimants.

Vacated and remanded.

David S. Mackey, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, was on brief for the United States.

Before BOUDIN, Circuit Judge BOWNES, Senior Circuit Judge, and STAHL, Circuit Judge.

BOUDIN, Circuit Judge.

This appeal arises out of a title dispute between a family and the United States over an 8.6 acre parcel, known as the Lombard lot, containing within it a family cemetery and located in the Bound Brook Island area of Wellfleet, Cape Cod, Massachusetts. The lot was once owned by Thomas Lombard, who died in 1873, leaving it to his five children as tenants in common. Then, in 1924, two of the children conveyed their interests to one George Higgins, possibly saying that they owned the entire parcel. In all events, George Higgins thereafter claimed ownership of the entire parcel and not just of the 40 percent that the two children had actually owned.

In 1935, Higgins petitioned the Massachusetts Land Court to register and confirm his sole title to nearly 150 acres of land in the Bound Brook Island area, including the 8.6 acre Lombard lot. One of Thomas Lombard's grandsons appeared in the suit, claiming an interest, and at Higgins's request, the suit so far as it pertained to the Lombard lot was severed from the rest. The court then confirmed Higgins's title to the other land, but the severed case involving the Lombard lot remained dormant until 1958, when it was ordered dismissed without prejudice; through apparent error, the dismissal order was not

properly docketed and, in 1976, the land court *sua sponte* docketed an order dismissing the severed case for lack of prosecution.

In the meantime, in the 1960s the United States established the Cape Cod National Seashore by acquiring large amounts of land in Wellfleet and neighboring communities. In 1962, Higgins agreed to sell the Lombard lot to the United States—all of it, not just a 40 percent interest—and the deed was recorded in the Barnstable County Registry of Deeds on December 31, 1962. However, the government was aware of potential claims by Lombard descendants— the title search report incident to the sale so indicated—and by agreement with Higgins, it withheld the purchase price for the Lombard lot (apparently $13,500) so that Higgins could clear up the defect.

This Higgins sought to do by a quiet title action, brought in October 1963 in the Barnstable County Superior Court, naming as defendants among others the heirs of Thomas Lombard. Service was made by publication, and a deputy sheriff certified that despite a diligent search he had found none of the heirs within his precinct. A guardian ad litem, appointed to represent the heirs, supported Higgins's assertion that he had acquired full title by a combination of adverse possession and the deed from two of Thomas Lombard's children. In August 1964, the court confirmed Higgins's title, subject to the Lombard family's ownership of the cemetery and an easement to visit it.[1]

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[1]A month later the United States paid for the property. George Higgins had died during the proceeding but his wife, Katherine, was substituted and received the payment from the government.

In April 1997, eight descendants of Thomas Lombard brought the present lawsuit against the United States in the federal district court in Massachusetts under the partition statute, 28 U.S.C. § 2409. The plaintiffs, claiming through two of the three children of Thomas Lombard who had not conveyed their interests to Higgins, asserted that the Lombard descendants still owned 60 percent of the Lombard lot as tenants in common with the United States, and sought to partition their interest. The government, in addition to asserting title based on the 1964 decree, argued that the partition statute did not extend to suits in which title was disputed.

Discovery ensued as to what various Lombard descendants knew at different times about title to the Lombard lot and related matters. The United States then moved for dismissal or summary judgment, and the plaintiffs countered with a motion for summary judgment to recognize their title and later a motion to amend the complaint to assert a claim under the Quiet Title Act, 28 U.S.C. § 2409a; this is a later-enacted companion to the partition statute that permits a quiet title action against the United States, provided it is brought within twelve years of the date that "the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.* § 2409a(g).

In November 1998, the district court granted the government's motion for summary judgment as to the partition statute claim, denied the plaintiffs' motion for summary judgment as to title, denied as futile the plaintiffs' motion for leave to amend, and entered final judgment for the United States. *Lombard v. United States*, 28 F.Supp.2d 44, 50 (D.Mass.1998). The court ruled that the partition statute authorized division only of undisputed interests in common and did not permit the court to resolve title disputes. As for the plaintiffs' motion to amend to assert a quiet title claim under the Quiet Title Act, the court held that the amendment

would be futile because the claims of the plaintiffs, and several additional heirs who had intervened, were barred by the twelve-year statute of limitations governing section 2409a. This appeal followed.

Two circuits have held, consistent with the district court's view, that the partition statute does not allow claims by a citizen whose title is disputed. *See Stubbs v. United States*, 620 F.2d 775, 782 (10th Cir.1980); *Rambo v. United States*, 145 F.2d 670, 671 (5th Cir.1944), *cert. denied*, 324 U.S. 848, 65 S.Ct. 685, 89 L.Ed. 1408 (1945). *Rambo*, the only decision that offers much analysis, 145 F.2d at 671, reasoned that, historically, partition actions did not resolve title disputes; that waivers of sovereign immunity are strictly construed; and that (as of 1944) the United States had not consented to suits against it to resolve title disputes as to property it purported to own. 145 F.2d at 671.

Of course, the last of these concerns was eliminated in 1972 when Congress adopted the Quiet Title Act, explicitly authorizing quiet title actions against the United States and thereby waiving sovereign immunity as to such claims. *See* Act of Oct. 25, 1972, Pub.L. No. 92-562, § 3(a), 86 Stat. 1176 (codified as amended at 28 U.S.C. § 2409a). Conversely, even if we were to read the partition statute now to embrace cases of disputed title, we could hardly ignore the explicit twelve-year statute of limitations on quiet title disputes. *See* 28 U.S.C. § 2409a(g). The rationale for limiting the partition statute to undisputed titles may have vanished in 1972, but any effort to read the two statutes in light of each other works both ways: if the partition statute allows the court to resolve incidental title disputes (a point we need not decide), it is so only if the suit is brought within the twelve year limitations period.

This brings us to the statute of limitations issue. Formally, the district court merely denied the plaintiffs'

motion to amend, which the government claims is a step reviewed solely for "abuse of discretion." This would be so if the district court had said that the amendment came too late based on concerns about case management. *See Credit Francais Int'l v. Bio- Vita*, 78 F.3d 698, 704 n. 9 (1st Cir.1996).[2] But as we read the district court's decision, it rests squarely on a finding that the amendment would be futile *because* the plaintiffs' quiet title claim is barred by the statute of limitations, a finding that it supports with a detailed discussion of the facts.

If the same Lombard plaintiffs now brought a *new* action under the quiet title statute, the United States would assert that the district court's finding was res judicata on the limitations issue. Thus, we treat the district court decision just as if the district court had granted the motion to amend and then dismissed the new claim on the ground that the statute of limitations had run. *See Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 49 (2d Cir.1999); *Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir.1997). Ordinarily, a grant of summary dismissal invites *de novo* review on appeal. *See Cadle Co. v. Hayes*, 116 F.3d 957, 960 (1st Cir.1997).

The district court ruled that the Lombard heirs had enough information to alert them over twelve years ago to the government's adverse claim to the Lombard lot and—this is a somewhat different point—that many of the plaintiffs acknowledged by their admissions and actions that they thought that they had no interest in the property. Specifically,

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[2]It appears that the motion to amend was made with reasonable promptness after the government asserted that the partition statute did not reach disputed titles, and much of the discovery was in fact addressed to the statute of limitations issue. Moreover, the district court took care to separate out other proposed amendments by the plaintiffs, which it denied as untimely. *See Lombard*, 28 F.Supp.2d at 48.

the district court found the following as to some, or all, of the plaintiffs:

> . That "most of the plaintiffs have believed for decades that David Lombard had stolen [the Lombard lot] . . . and sold it to Higgins" and "[i]n light of the widespread family knowledge of the sale [to Higgins] over such a long period of time, they could easily have learned the status of the property by making inquiry";
>
> . That some of the plaintiffs recalled learning of the Cape Cod National Seashore in the 1960s, and that "most knew that the United States had acquired the Brook Bound (sic) Island property for that purpose [the Cape Cod National Seashore]"; and
>
> . That the plaintiffs did not pay property taxes on the land surrounding the cemetery, did not maintain that land, did not occupy it and did not assert ownership to the National Park Service or the Town of Wellfleet, but at most "occasionally visited the family cemetery, picked blueberries, and had picnics on the adjacent property."

*Lombard*, 28 F.Supp.2d at 49.

The district court's finding that as early as the 1960s, "most [of the plaintiffs] knew that the United States had acquired the Brook Bound (sic) Island property for that purpose," could be taken as a reference to the Lombard lot itself. If so read and adequately supported in the record, this would resolve this case in favor of the United States: it would mean that such plaintiffs had *actual* knowledge of the government's claim to the Lombard lot as far back as the

1960s. Yet we cannot find any unambiguous record evidence that any of the plaintiffs knew prior to this suit that the government had acquired the Lombard lot or any interest in it.

Ample evidence in the record shows that some plaintiffs knew that the government was purchasing property on *Cape Cod* for the purpose of creating the National Seashore. There is even some indication that individual plaintiffs had sold other property to the government for this purpose, although it is unclear whether this property was in the Bound Brook Island area. In all likelihood, the district court's quoted finding meant only that the plaintiffs knew that the government was buying property for the National Seashore in Wellfleet, including property in the Bound Brook Island area.

Of course, the statute of limitations does not require actual knowledge of the government's claim. If other facts known twelve or more years before this action was brought would have prompted a reasonable landowner to make further inquiries, which in turn would have led to knowledge of the government's claim, then the statute bars the owner because he "should have known" of the government's claim.[3] And had the plaintiffs' suspicions been aroused, the government's claim would have been easy to discover, either by asking national seashore officials or looking at the title records at the Barnstable registry.

But what events fairly charged the plaintiffs with reasonable suspicions requiring further inquiry? Merely to say

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[3]*See, e.g., Park County, Montana v. United States*, 626 F.2d 718, 721 n. 6 (9th Cir.1980), *cert. denied*, 449 U.S. 1112, 101 S.Ct. 923, 66 L.Ed.2d 841 (1981); *Grosz v. Andrus*, 556 F.2d 972, 975 (9th Cir.1977); *Howell v. United States*, 519 F.Supp. 298, 304-06 (N.D.Ga.1981).

that the government was buying land somewhere in Wellfleet or the Bound Brook Island area for its national park is hardly enough, and there is little to show the location of government land purchases known to individual plaintiffs. About the most one can say is that this background knowledge of purchases in the area might have added to suspicions of a government claim to the Lombard lot *if* there were other, more specific indications suggesting that the government was claiming ownership of the Lombard lot.

Elsewhere in the opinion the district court noted that the government had erected a locked gate somewhere on the road to the family cemetery, *see Lombard*, 28 F.Supp.2d at 49-50, and there is also an indication in the record that at some point trees grew up around the road making it difficult for cars to pass. At least some of the plaintiffs knew that the gate was under the government's control; one of the plaintiffs had complained and the government had provided a key to the gate, although it did not remove the barrier. We agree that, if the government puts a gate at the entrance to your property, this is ordinarily sufficient notice to warrant inquiry. *Cf. Park County, Montana*, 626 F.2d at 721 n. 6; *Grosz*, 556 F.2d at 975; *Howell*, 519 F.Supp. at 304-06.

The plaintiffs argue that any knowledge that the government was exercising some proprietorship over the Lombard lot would have been consistent with a belief that the government owned 40 percent and would not suggest that the government was claiming ownership of the 60 percent interest now claimed by the Lombard heirs. Perhaps so *if* the plaintiffs knew that a 40 percent ownership interest had been claimed by Higgins and that the government had been dealing with him to acquire his interest. But none of the plaintiffs claim to

have known anything about the sale by Higgins to the government of his Lombard lot interest.[4]

The more serious problem with the gate argument is that nothing in the testimony or crude maps in the record indicates to us precisely where the gate was placed in relation to the property line of the Lombard lot. For example, if the gate was just at the property line of the Lombard lot, this might support an inference that the government was claiming ownership of the lot. But if the gate were on a portion of the road leading to the Lombard lot but not yet actually within the lot, it might have been put there simply to limit access to other government property through which the road ran before reaching the Lombard lot. In that event, it would not necessarily suggest that the government was claiming ownership of the lot itself, and providing a key to the gate would be consistent with recognizing an easement over the road to reach the Lombard lot, *cf. Shultz v. Department of Army*, 886 F.2d 1157, 1159-61 & n. 2 (9th Cir.1989).

It is worth adding that the district court's opinion did not rely at all on the gate in giving its *reasons* why the claim was barred. The gate was mentioned only briefly in setting out the facts. *See Lombard*, 28 F.Supp.2d at 49-50. The government refers to it merely as part of a bouillabaisse description of all of the possible facts that it thinks in any way support an inference of knowledge or suspicion. Only with more detailed and specific findings by the district court could the gate help to show that the plaintiffs "should have known" of a government claim to own the Lombard lot.

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[4]To the extent that the plaintiffs did have knowledge of a sale by Higgins to the government, the inference that he had only sold a 40 percent interest might not be easy to reconcile with the family legend that the whole property had been stolen from the Lombards.

The district court pointed to two other sets of facts: that a number of plaintiffs thought that the Lombard lot had been stolen by Higgins long ago and that the heirs did not pay property taxes, maintain the lot, live there, assert ownership, or visit it except occasionally. *See Lombard*, 28 F.Supp.2d at 49. There is not much information about taxation rates and enforcement but, this aside, we agree with the district court that these facts support an inference that for some years the plaintiffs might well have thought that they had no claim at all to the Lombard lot. Rising property prices, it may be supposed, have now prompted a closer look.

If we were concerned with laches or other equitable limitations, all this might be grist for the mill. But the statute of limitations in this case is triggered only if the plaintiffs knew or should have known of the *government's* claim, *compare United States v. Beggerly*, 524 U.S. 38, ----, 118 S.Ct. 1862, 1868, 141 L.Ed.2d 32 (1998); that for other reasons they may have doubted their own title is beside the point unless this fact fits into a set of inferences suggesting that they believed or should have believed that the government claimed title. This might well be the case if they had known of Higgins's sale to the government, but the record is at best uncertain on this point.

One might ask why it matters whether the plaintiffs knew of the government's claim or merely lacked faith in their own. The answer is that an owner does not normally forfeit his ownership of real property through ignorance of his title, unless adverse possession is established (and that requires a showing of notorious possession and often for more than twelve years). *See, e.g.*, Eno & Hovey, 28 Massachusetts Practice § 27.1, at 560-62 (3d ed.1995).

In waiving sovereign immunity to quiet title actions against it, the government established a special limitations period favorable to itself, but only where the property owner

knew or should have known that the *government* claimed ownership (and then failed to dispute it within the period).

Thus far, we have treated the plaintiffs as a group and made reference to the district court's findings of what "most" or "many" of the plaintiffs knew. Strictly speaking, the Quiet Title Act, subject to certain qualifications, requires that each plaintiff's claim be assessed individually, meaning that some may lose their claims while others may not, depending on individual knowledge. *See, e.g., Klugh v. United States*, 818 F.2d 294, 299 (4th Cir.1987).[5] The district court made some effort to distinguish among groups of heirs based on their level of knowledge.

If the parties did not object to composite plaintiffs or treatment of them collectively by group, this might be a reasonable approach for litigation, adopted by implicit agreement. Here, claimed shares of individual plaintiffs are rather minute (they appear in this case to range from 1/15 to 1/300); and an heir-by-heir analysis might well be costly and productive of only minute victories. We mention the issue only to avoid any implicit endorsement of the composite or grouping approach as a general construction of the statute.

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[5]The primary qualification to this rule is that if the plaintiff's predecessor in interest knew or should have known of the government's claim, then the plaintiff's claim is time-barred. *See* 28 U.S.C. § 2409a(g). And while knowledge of one plaintiff is not normally imputed to another, there is some indication in this case that heirs located in or near Cape Cod effectively acted over the years as agents on behalf of other heirs located in distant locations throughout the country, which may make it appropriate to impute the knowledge of the agent-heirs to the principal heirs. *Cf. Klugh*, 818 F.2d at 299-301.

We turn now to plaintiffs' further claim that they were entitled to judgment in their favor on the issue of title. Their argument is that the 1976 dismissal of Higgins's original "severed case," in which he sought to acquire from the state land court a declaration of full ownership over the lot, was a dismissal "with prejudice" under state law; that this dismissal therefore determined that Higgins owned only 40 percent of the Lombard lot and the heirs owned the remainder; and that the federal district court was required under the Full Faith and Credit Statute, 28 U.S.C. § 1738, to accept this determination as binding in the present action against the United States.

Because the original 1958 order of the land court made clear that the dismissal of the severed action was intended to be without prejudice, it would not normally result in claim preclusion, *see Restatement (Second) of Judgments* § 20 (1982), and since no facts were actually resolved in the case at all, there cannot be issue preclusion under ordinary doctrine. *See id.* § 27. Still, plaintiffs say that Mass. Gen. Laws ch. 185, § 44 (1998) requires a different conclusion because the 1976 cleanup order did not say expressly that it was without prejudice. The statute reads:

> If the court finds that the plaintiff has not title proper for registration, a judgment shall be entered dismissing the complaint, and such judgment may be ordered to be without prejudice, in whole or in part, but unless so ordered it shall bind the parties, their privies and the land in respect of any issue of fact which has been tried and determined.

Even if we assume that section 44 applies—which is unclear[6]—the most one could say is that section 44 might then treat a judgment of dismissal, where silent, as "bind[ing] the parties, their privies and the land in respect of *any issue of fact which has been tried and determined.*" *Id.* (emphasis added). But no issue of fact was tried and determined in the severed case. At most a dismissal with prejudice might mean that Higgins could not bring the same action again.

The plaintiffs also rely on *McCarthy v. Town of Oak Bluffs*, 419 Mass. 227, 643 N.E.2d 1015 (Mass.1994). There, as here, a registration case in the land court was thereafter severed into two—one for property claimed east of a specific mean low water line and the other for land west of the line. *See* 643 N.E.2d at 1018. The former case was pursued and resulted in a decree of registration in 1960; the latter was dismissed in 1977 for lack of prosecution. *See id.* Thereafter, privies of the plaintiffs brought a new suit asserting title to the western portion, the subject of the dismissed suit, and the court held that the new suit could not be brought. *See id.* at 1019.

But the court's reasons destroy the parallel with the present case. The land court held in the new suit that the earlier one had made a factual determination of the western boundary of the property; and it was this finding to which the court gave preclusive effect. *See id.* at 1018-19, 1021. Further, it found that the original plaintiffs had signed a stipulation

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[6]At different times pertinent here the land court has been subject to different sets of civil procedure rules that also bear on whether a dismissal is with or without prejudice. *Compare* Mass.R.Civ.P. 1, 41(b)(1), 58(a), 79(a), *with Massachusetts Rules of Court* (1969), at 159, 162, 214 (reprinting pre-1974 versions of Superior Court Rules 79 and 85 and Land Court Rule 6).

stating that they had no interest in land westward of the line, that licenses they had taken confirmed that concession, and that state law made it illegal for them to own land westward of the line. *See id.* at 1018-19. Thus *McCarthy* is not on point.

To sum up, we conclude that the rejection of the proposed amendment to the complaint cannot on this record be supported on the ground given for the denial. However, the plaintiffs' full faith and credit argument is without merit and to prevail ultimately, the plaintiffs would have to avoid the 1964 quiet title judgment and defeat a likely claim by the government that Higgins had obtained full title to the Lombard lot by adverse possession.[7] And if title to fractional interests were established by plaintiffs, problems of remedy would remain.

Such issues could be costly and time consuming to litigate on both sides. And, while the government's hands are not perfectly clean (given its actual knowledge of Higgins's doubtful paper title to the whole), the plaintiffs are in some measure seeking a windfall from property widely thought to have been lost long ago by the family. All this suggests that both sides might be well advised to renew their earlier, unsuccessful efforts to settle the case.

The judgment of the district court is *vacated* and the case is *remanded* for further proceedings consistent with this opinion. Our judgment reinstates the partition statute claim

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[7]Apparently plaintiffs' claim, on which we take no position, is that notice publication was constitutionally inadequate because some of the Lombard heirs lived in the county and could have been served personally. Moreover, it is unclear what basis the *guardian ad litem* had for believing that Higgins could claim title by adverse possession or what answer plaintiffs might have to such a claim.

merely as a contingent remedy available if and when the plaintiffs can establish ownership under the Quiet Title Act by satisfying the statute of limitations and all other prerequisites. Nothing in our decision precludes a further motion for summary judgment by the government on statute of limitations grounds (assuming a more developed record) or any other ground available to it.

*It is so ordered.*

United States District Court, D. Massachusetts.

Edward E. LOMBARD et. al, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

**No. Civ.A.97-10725-PBS.**

Aug. 28, 2002.

*MEMORANDUM AND ORDER*

SARIS, J.

I. *INTRODUCTION*

This case involves a title dispute concerning 8.6 acres of land on Bound Brook Island, located within the Cape Cod National Seashore. The plaintiffs, Edward Lombard and his siblings, cousins, and nieces, bring this action pursuant to the Quiet Title Act, 28 U.S.C. § 2409a, disputing the government's title and claiming that the government and they are tenants in common.

The parties have filed cross-motions for summary judgment. After hearing, defendant's motion for summary judgment is *ALLOWED*.

II. *BACKGROUND*

Familiarity with the history of this dispute described in this court's earlier opinion and the appellate decision is assumed. *See Lombard v. United States*, 28 F.Supp.2d 44 (D.Mass.1998), *rev'd*, 194 F.3d 305 (1st Cir.1999) (*"Lombard I"*).

At the heart of a choice piece of property on Bound Brook Island lies the family cemetery of the Lombards, whose patriarch—Thomas Lombard—was the land's original owner. Upon his death in 1873, Lombard was survived by five children—Edward, Richard, Benjamin, David and Mary. He died intestate. In 1924, two of the children, David and Mary, conveyed the real estate (except for the family cemetery and access thereto) to George Higgins. Higgins sought to register and confirm his title to the land in Massachusetts Land Court in 1935. He abandoned this endeavor, however, after Henry Lombard, the son of Benjamin and grandson of Thomas, claimed an interest in the land as his father's heir. The case was marked "inactive" in 1957, dismissed without prejudice in 1958, and—apparently due to a clerical error—languished on the docket until 1976, when it was dismissed for lack of prosecution.

The government arrived on the scene in 1962, purchasing title to the land from Higgins. The following year, Higgins made another attempt to quiet title, this time in Barnstable Superior Court Case Number 27434. The suit named "Thomas Lombard" and "his Heirs and Devisees" as respondents. No personal service was made, and no service was made by mail on the Lombard heirs.

The evidence establishes the following facts regarding the Barnstable Court's service on defendant Thomas Lombard and his heirs in Case Number 27434. First, a copy of the subpoena in small print was published for three successive weeks in the *Cape Cod Standard Times* in October and November of 1963. Second, copies of the subpoena were posted in the County Registry of Deeds in October 1963. Third, copies of the subpoena were posted on the contested property (the record does not specify the precise location). Fourth, personal service was effected on three individuals whose property abutted the Lombard property. Fifth, Howard Clahoon, Deputy Sheriff, certified that he "made diligent

search for . . . Thomas Lombard . . . and for [his]] last and usual place of abode, Agent or Attorney but [was] not been able to find [them] within [his] precinct." Of course, as plaintiffs point out, Thomas Lombard's last abode was subterranean in the very cemetery on the land where the sheriff posted his notice. Sixth, on or about May 2, 1964, after Katherine Higgins became executrix of her now-deceased husband's estate and was substituted as petitioner,[1] the court appointed a guardian ad litem, James H. Quirk, pursuant to Mass. Gen. Laws ch. 240, § 8, to represent those respondents "unascertained, unknown, out of the Commonwealth and/or not in being, or who cannot be served with process or made amenable to the Orders of this Court." Quirk's report, issued in 1964, stated that after having "investigated the matter, examined all of the pleadings and examined the title searcher's report . . . . [and] pursued the record title of the property in the Registry of Deeds and in the Probate Court for the County of Barnstable . . . . the persons to whom notice of said proceedings were given are the only persons entitled to notice that can be discovered."[2] Finally, three signed affidavits of

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[1]Mass. Gen. Laws ch. 240, § 8 provides for appointment of a guardian ad litem in a quiet title action if the court finds "that there are or may be defendants not actually served with process within the Commonwealth . . . ." If a guardian ad litem is appointed, "the court may proceed as though all defendants had actually been served with process." *See* Mass. Gen. Laws ch. 240, § 10.

[2]No date is legible on the copy of the guardian ad litem's report submitted to this Court. However, his research must have been conducted between May 11, 1964 and August 20, 1964 because: a) the report itself notes that the investigation was conducted "pursuant to an Order issued by [a] . . . Justice of the Superior Court dated May 11, 1964" (after George Higgins' death); and b) the Barnstable court's final

adverse possession, two from Wellfleet residents who knew at least two members of the Lombard family, were appended to Quirk's report.

The government points to several additional facts that bear upon the adequacy of notice. The guardian ad litem's report was apparently correct in stating that plaintiffs have never been owners of record, and their names appear in neither the Registry of Deeds nor in the Barnstable Probate Court records. The disputed locus does not appear in the probate inventories of Benjamin, Richard S., or Edward E. Lombard, the sons of Thomas Lombard through whom Plaintiffs claim title. None of Plaintiffs' names appears in the assessor's records for the Town of Wellfleet. Finally, Plaintiffs never paid property taxes on the land surrounding the family cemetery, maintained or improved it, or contacted the Park Service or Town of Wellfleet about their respective interests in it. *Lombard I*, 28 F.Supp.2d at 49.

The Barnstable court's final decree, entered on August 20, 1964, confirmed title in Katherine Higgins "free and clear of all liens and encumbrances," except for the Lombard family's rights in the burial plot itself and its access. The report also stated that "notice according to the Order [was] given to all parties interested and . . . James H. Quirk the Guardian ad Litem appointed by the Court . . . made an investigation and search and reported to the Court." Soon after the decree was issued, the government paid Katherine Higgins for her property.

The Lombard family has continued to visit the cemetery since 1964. Several Plaintiffs also remember

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decree, dated August 20, 1964, noted that the guardian ad litem had "made an investigation and search and reported to the Court."

childhood picnics and blueberry picking taking place on the surrounding land. Sometime prior to September 1977, when the government gated the road the Lombard family used to access the cemetery, the family was provided with a key. Recently, however, the access road was allowed to revegetate and vehicle access was restricted.

## III. *DISCUSSION*

### a. Summary Judgment Standard

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 36 (1st Cir.1995) (quoting Fed.R.Civ.P. 56(c)). "To succeed [in a motion for summary judgment], the moving party must show that there is an absence of evidence to support the nonmoving party's position." *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir.1990); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

"Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.'" *Barbour*, 63 F.3d at 37 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). "There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" *Rogers*, 902 F.2d at 143 (quoting *Anderson*, 477 U .S. at 249-50) (citations and footnote in *Anderson* omitted). The Court must "view the facts in the light most favorable to the non-moving party,

drawing all reasonable inferences in that party's favor." *Barbour*, 63 F.3d at 36.

b. Legal Foundations

Describing the Barnstable court's judgment as a prior final decree, the government contends that this Court is obliged to grant it full faith and credit.[3] *See* 28 U.S.C. § 1738 ("[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). They claim, correctly, that the principle applies to actions regarding land ownership. *See Cadorette v. United States*, 988 F.2d 215, 219 (1st Cir.1993) (opining, in a land condemnation case, that "[o]rdinarily a federal court will (indeed, must) accept . . . final state court awards as legally binding."); *Underwriters Nat'l Assurance Co. v. No. Carolina Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 707 (1982) (noting that "[t]he need for finality within our federal system . . . applies with equal force to questions of jurisdiction.").

Plaintiffs stress that the due process clause requires notice and an opportunity to be heard. "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. Due process requires that the defendant be given adequate notice of the suit . . . ." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (citations omitted). *See also* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2862, at 198-200 (1st ed. 1973) ("As is true of an absence of

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[3]This Court allowed the government's motion to amend the answer to assert this defense, as well as the defense of laches. I need not address the defense of laches in light of my determination that the government prevails on the full faith and credit argument.

personal and property jurisdiction, a failure to provide the defendant with proper notice of the action and an opportunity to be heard will subject a judgment to collateral attack."). A void judgment is not "final," and therefore not entitled to full faith and credit in a subsequent judicial proceeding. *Underwriters Nat'l Assurance Co.*, 455 U.S. at 704-5.

The Quiet Title Act grants federal district courts exclusive original jurisdiction to hear "civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C. § 1346(f). Federal abstention doctrine, which ordinarily precludes a federal court from hearing claims that are "inextricably intertwined" with prior claims adjudicated in state court, does not apply in this context.[4] *See Key v. Wise*, 629 F.2d 1049, 1059 (5th Cir.1980) ( "When Congress has directed . . . not only that the federal courts may take jurisdiction of a particular class of cases, but also that they have exclusive jurisdiction of those cases, abstention to permit adjudication of the entire case in a state forum defeats the purpose of that legislation.").

The question of when claim and/or issue preclusive effect should be accorded prior state court judgments in actions under exclusive federal jurisdiction has engendered

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[4]The "Rooker-Feldman" doctrine, named after *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923) (barring collateral attack of a state court judgment in lower federal courts), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485-86 (1983) (dismissing action challenging state court denial of request to waive bar admission requirements), strips lower federal courts of subject matter jurisdiction over claims that are "inextricably intertwined" with claims adjudicated in a state court. *See Sheehan v. Marr*, 207 F.3d 35, 40 (1st Cir.2000) (quoting *Feldman*, 460 U.S. at 483 n. 16).

scholarly exploration. *See generally* 18B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* §§ 4470, 4470.1, 4470.2, 4470.3 (2d ed.2002); Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 Harv. L.Rev. 1281 (1978). Some scholars have framed the analysis by asking whether, in a particular case, the statute that mandates exclusive federal jurisdiction implies a partial repeal of the full faith and credit statute. 18B *Fed. Practice* at 167-68, 196. Yet "[t]here is no clear guide to support" this inquiry. *Id.* at 167. In effect, judges are asked to "reconcil[e] state preclusion principles," on a case-by-case basis, "with the purposes of exclusive federal jurisdiction" that may be deduced from the statutory text and history. *Id.* at 164.

Despite the absence of bright-line rules, a few general principles have emerged. First, "preclusion seems least dangerous as to issues of historic [sic] fact." *Id.* (collecting cases). Second, "[i]ssue preclusion is most secure, regardless of the basis for exclusive federal jurisdiction, when the federal court itself would apply state law to the issue." *Id.* at 198.

To navigate through these intricacies, this Court begins with the First Circuit's earlier holding to clarify the appropriate scope of inquiry. *See Lombard I*, 194 F.3d at 312.

> [P]laintiffs' full faith and credit argument [that the Massachusetts Land Court's 1976 dismissal entitles them to a 60% ownership share] is without merit and to prevail ultimately, the plaintiffs would have to avoid the 1964 quiet title judgment and defeat a likely claim by the government that Higgins had obtained full title to the Lombard lot by adverse possession.

In other words, unless notice was constitutionally defective in the 1964 Barnstable Court case, the judgment must

be deemed "final." Although this Court has exclusive jurisdiction to determine title, *see* 28 U.S.C. § 1346(f), all preclusive effect should be given to the state court's determination of "historic[al] fact." 18B *Fed. Practice* at 164. This is especially so in a dispute involving title to land, the *quintessential type of case in which* "a federal court itself would apply state law to the issue." *Id.* at 198.

Indeed, deference to state court findings is especially warranted because at this late date many of the people who might have relevant information are no longer available. For example, the parties have been unable to ascertain the whereabouts of Howard Clahoon, the Deputy Sheriff who originally sought to serve process on Thomas Lombard and his heirs and devisees. James H. Quirk, the Guardian ad Litem appointed by the Barnstable court, and Haughton Sanguinetti, the lawyer who represented Higgins in the Barnstable court action and apparently conducted title searches related to that case, are both deceased. Defendant has also produced a signed declaration by William T. Munson, the lawyer for the title insurance company, stating that he has no memory of the relevant transaction and that his records were destroyed in 1978 or 1979. Plaintiffs also offer no evidence to dispute defendant's documented claim that the research records of Gaston & Snow, the title insurance company believed to have issued a title policy for the Lombard lot, were destroyed in 1993 or 1994.

First Circuit precedent underscores the considerable deference to which state court judgments are entitled in federal quiet title actions. In *Cadorette v. United States*, 988 F.2d 215, 220 (1st Cir.1993), also brought under § 2409a, the First Circuit held that full faith and credit required the federal district court to accept the Massachusetts probate court's prior determination regarding the ownership of a 25% property share. "Ordinarily a federal court will (indeed, must) accept [ ] final state court awards as legally binding . . . [unless there is

a] special reason . . . for departing from this general rule." *Id.* at 220. In a similar vein, the Restatement has noted that "[w]here the state tribunal was not utterly lacking in authority to determine the matter, its judgment is entitled to some weight. . . ." *Restatement (Second) of Judgments* § 86 (1982) at 305. "The values underlying the rule of finality are, generally speaking, no less when the judgment is that of a state court challenged in federal court than in any other context of recognition." *Id.* at 307.

c. Was Notice Constitutionally Defective?

Under *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950), the focus on the due process inquiry is whether notice procedures are "reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, [whether] the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." Since "publication alone . . . is [not] a reliable means of acquainting interested parties of the fact that their rights are before the courts," this method passes constitutional muster only when those to whom notice is due are missing or unknown. *Id. See also Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 801 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable."); *Dusenbery v. United States*, 534 U.S. 161, 699 (2002) (holding that *Mullane* is the appropriate analytical framework for analyzing adequacy of notice in administrative forfeiture proceeding).[5]

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[5]Although notice by posting on land is disfavored under *Mullane* and *Mennonite*, its use seems more reasonable than usual here, since Plaintiffs claim to have visited the

Under *Mullane* and its progeny, then, the key issue is whether the name and address of the plaintiffs were "reasonably ascertainable" at the time of the Barnstable court action—if not, then notice by posting and publication was constitutionally adequate. Although notice by publication was the sole method of service used by the defendant-appellee in *Mullane*, 339 U.S. at 310, the Supreme Court later clarified that notice by posting and publishing is also constitutionally inadequate for individuals whose whereabouts are reasonably ascertainable. *See Mennonite*, 462 U.S. at 797. Perfunctory efforts to provide notice will not suffice. *See United States v. 125.2 Acres*, 732 F.2d 239, 242 (1st Cir.1984) (holding that publishing and posting was inadequate where the government possessed knowledge of the claimant's name and town, the community was small, and the telephone book provided his street address).

Plenty of the facts on record suggest that reasonable (although perhaps not exhaustive) efforts were made to ascertain Plaintiffs' whereabouts. Most significantly, unlike the situation in *Cadorette*, the court appointed a guardian ad litem. *See Cadorette*, 988 F.2d at 220 (rejecting district court's allocation of different ownership share where record "reveal[ed] no *significant effort* by anyone to search for, or to contact, by publication or otherwise" the descendants, and where the district court rejected plaintiff's motion for appointment of a guardian ad litem "to do precisely that."). The guardian ad litem specified that his investigation for the heirs of Lombard included searches of the pleadings, the title searcher's report, record title in the registry of deeds, probate court records, and three affidavits of adverse possession. *See Dwight v. Dwight*, 371 Mass. 424, 427, 357 N.E.2d 772, 774 (1976) (holding that non-party whose interests were

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cemetery *"continuously, without interruption* ... since before Thomas Lombard's death in 1873."

represented by a guardian ad litem who acted as their fiduciary in prior litigation were bound by the prior judgment). The parties' independent investigation has confirmed the validity of the guardian ad litem's assertions. It is also undisputed that the locus does not appear in the probate inventories of Thomas Lombard's children; that none of Plaintiffs' names appeared in the Wellfleet assessor's records; and that Plaintiffs never maintained, improved, or paid property taxes on the land surrounding the family cemetery.

In the context of land foreclosure proceedings, two Massachusetts cases decided since *Mullane* have held that an owner's name and address were not "reasonably ascertainable" because public records like those mentioned above did not divulge them. In one case, the Supreme Judicial Court held that a town was only required to discover the owner's identity through "resort to the records in the appropriate registry of deeds and registry of probate." *Hardy v. Jaeckle*, 371 Mass. 573, 580, 358 N.E.2d 769, 774 (1976). The *Hardy* court held that the board exercised "reasonable diligence" in locating the owners, despite its failure to inquire whether any Nantucket residents whose name was the same as that of the original owners had an interest in the property; to undertake genealogical and historical research; or to research the probate records of distant ancestors. *Id.* at 582-83. *See also Robertson v. Town of Plymouth*, 18 Mass.App.Ct. 592, 594, 468 N .E.2d 1090, 1092 (1984) (holding that "reasonable diligence" only required board of assessors to determine owner of disputed parcel by examining contents of registry of deeds and registry of probate).

The Supreme Court has indicated that under *Mullane*, constructive notice is constitutionally adequate for individuals whose name and address cannot be gleaned from public records:

> When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But *unless the mortgage is not reasonably identifiable,* constructive notice alone does not satisfy the mandate of *Mullane.* . . . We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.

*Mennonite,* 462 U.S. at 798 (emphasis added).

Plaintiffs nevertheless maintain that the Lombards were "easily identifiable" because they resided in Wellfleet, a small community of just 2,000 people, with many summer homes. Yet the facts on record do not establish that Plaintiffs could have been readily located during the pendancy of the Barnstable action. For example, although both sides agree that two of the three affiants regarding Higgins' alleged adverse possession of the property "were known to some of the Lombard family," there is no evidence that Katherine Higgins or the guardian ad litem knew that the affiants had this information.

Second, Plaintiffs reason that they were easily identifiable to the local sheriff because George Higgins on numerous occasions personally contacted the Lombards. While the evidence supports Plaintiffs' contention that Higgins contacted various Lombards to persuade them to sign over their interests in the locus, Higgins died in February, 1964. Again, there is no evidence that Katherine Higgins or the guardian ad litem knew or could reasonably have ascertained this information.

Third, although Plaintiffs stress that various Plaintiffs "maintained homes" in Wellfleet or "lived in Wellfleet all their lives," most—if not all—owned homes elsewhere, visiting Wellfleet only during the summer months. There is no evidence in the record as to whether any of the Lombard progeny lived on the property year-round, or whether Plaintiffs' names and addresses were listed in the Wellfleet phone directory. *Cf. 125.2 Acres*, 732 F.2d at 242 (noting that service by publishing and posting was inadequate because government not only knew name and town of owner, but also had "access via the telephone book to his street address.")

While a savvy sleuth may have been able to locate the Lombard heirs, scant evidence exists in this Court's record that their whereabouts were "reasonably ascertainable" at the time of the 1964 Barnstable court action. To re-open a judgment in this circumstances would deprive the state court's judgment of the considerable weight to which it is entitled, and do violence to "[t]he values underlying the rule of finality." *See Restatement (Second) of Judgments* § 86 (1982) at 307.

d. Miscellaneous Issues

Plaintiffs raise three additional arguments under state law. First, they argue that the 1935 land court case, for which an "Order For Dismissal" was issued in 1958 but a "Judgment of Dismissal" did not issue until 1976 due to a record- keeping error, deprived the Barnstable Superior Court of jurisdiction and voided its decree. Higgins' original petition to the Barnstable County Superior Court alerted the court to the dismissal of the earlier action. The concurrent subject matter jurisdiction of Massachusetts Land Courts and Superior Courts over quiet title actions pursuant to Mass. Gen. L. ch. 240, § 6 was by then established. *See Cesarone v. Femino*, 340 Mass. 638, 639, 165 N.E.2d 751, 752 (1960) (holding that either Land Court or Superior Court could take jurisdiction over action involving ownership of registered land). The fact that

a record-keeping delayed the technical closing of the Land Court case by almost twenty years does not alter the fact that the action was dismissed without prejudice prior to the Barnstable Court's assumption of jurisdiction. Granting the Barnstable Court's conclusion that it had concurrent jurisdiction to hear the action preclusive effect seems reasonable in this context, since "the federal court itself would apply state law to the issue." 18B *Fed. Practice* at 198.

Plaintiffs seek to bolster their claim by pointing to the First Circuit's observation in *Lombard I* that "[a]t most a dismissal with prejudice might mean that Higgins could not bring the same action again." 194 F.3d at 312. The First Circuit in *Lombard I* did not decide whether the 1976 cleanup order's failure to expressly say that it was without prejudice could, under Mass. Gen. Laws ch. 185, § 44 (1998), preclude Higgins from bringing the same action again—it merely assumed the point to demonstrate the futility of Plaintiffs' Full Faith and Credit argument. Yet in any case, such preclusive effects (if any) could not possibly have been triggered until 1976, since the original 1958 order "was intended to be without prejudice." *Lombard I*, 194 F.3d at 312. Finally, the very fact that the First Circuit deemed the applicability of § 44 to the 1976 cleanup order "unclear" counsels further against voiding the Barnstable Court judgment for lack of jurisdiction. *See Harris v. Sannella*, 400 Mass. 392, 395, 509 N.E.2d 916, 918 (1987) (collecting cases holding that concept of void judgments is narrowly construed, and in particular that an error in interpreting a statutory grant of jurisdiction is insufficient to render a judgment void).

Second, Plaintiffs argue (albeit fleetingly) that because notice of the Barnstable case allegedly was not recorded at the Registry of Deeds as required under Massachusetts law, the resulting judgment is not stare decisis. Yet as the statute itself makes plain, the judgment *is* binding against "the parties thereto, their heirs and devisees and persons having actual notice thereof. . . ." Mass. Gen. Laws ch. 184, § 17 (emphasis

added). "Thomas Lombard" and "his Heirs and Devisees" were named in the Barnstable court action, and Plaintiffs' claim to ownership derives exclusively from their status as alleged heirs of Thomas Lombard. They were represented by the guardian ad litem. Therefore, they are bound by the judgment regardless of whether notice of the Barnstable court judgment was recorded in the Registry of Deeds as long as due process requirements were met.

Finally, Plaintiffs argue that the execution of the deed between the United States and Higgins twenty months *before* the Barnstable decree renders the government's title invalid, since the doctrine of estoppel by deed does not apply to quitclaim deeds when the grantee is aware of the deficiency in title. The United States, meanwhile, contends that estoppel by deed applies to the transaction. This debate is academic. The doctrine—when applicable—inures to the benefit of the grantee. "[T]he grantor (and anyone claiming under him) is estopped from asserting *against the grantee* a claim of title to the property conveyed." *Zayka v. Giambro*, 32 Mass.App.Ct. 748, 751, 594 N.E.2d 894, 896 (1992) (emphasis added). *Cf. Baumrin v. Cornoyer*, 414 F.Supp. 326, 332 (D.Mass.1976) ("It is well established . . . that a mere quitclaim deed is ineffectual by force of estoppel to pass *to the grantee, or those holding* under him, any title or right acquired *by the grantor* subsequent to the execution of the quitclaim deed." (emphasis added)). Plaintiffs may be correct that the doctrine does not apply to the facts of this case despite the broad language in *Zayka v. Giambro:* "If estoppel by deed is a sound principle, no compelling logic or binding precedent proscribes its application to a quitclaim deed." 32 Mass.App.Ct. at 753, 594 N.E.2d at 896. The application of the doctrine turns on the "obvious intention of the parties." *Id.* The United States not only was aware of the potential cloud on the Higginses' title, but also made its payment contingent on their ability to obtain a final decree in their favor. *Lombard I*, 28 F.Supp.2d at 46. Yet this merely implies that the grantor (Higgins) might be estopped from

asserting a claim of title against the grantee (the United States). The doctrine—whether or not it applies—does not afford Plaintiffs independent grounds to invalidate the Barnstable court judgment.

## IV. *ORDER*

Defendants' second motion for summary judgment as to title is *ALLOWED*. The Plaintiffs' Renewed Motion after Remand for Summary Judgment as to Title is *DENIED*.

United States Court of Appeals,
First Circuit.

Edward E. LOMBARD; Asa P. Lombard, III; Edith Lombard Cassick; Ruth Lombard Gourley; Florence Lombard Brown; Barbara Lombard Banuk; Susan Lombard Black; Alton Horte; Carleton G. Smith; Barbara E. Baines; Virginia H. Hart,

Plaintiffs, Appellants,

v.

UNITED STATES of America, Defendant, Appellee.

**No. 03-1430.**

Heard Oct. 10, 2003.
Decided Jan. 23, 2004.

**Background:** Descendants of former property owner brought action challenging state court judgment quieting title in favor of predecessor in interest to United States, which acquired land for incorporation into Cape Cod National Seashore. The United States District Court for the District of Massachusetts, Patti B. Saris, J., 28 F.Supp.2d 44, ruled in favor of government, but the Court of Appeals, 194 F.3d 305, vacated and remanded. On remand, the District Court, 2002 WL 1998245, again ruled in favor of government, and descendants appealed.

**Holding:** The Court of Appeals, Boudin, Chief Judge, held that descendants received adequate notice, under due process clause, of state quiet title action.

Affirmed.

Anita Johnson, Assistant U.S. Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief for appellee.

Before BOUDIN, Chief Judge, TORRUELLA, Circuit Judge, and OBERDORFER,* Senior District Judge.

BOUDIN, Chief Judge.

In the early 1960s, the United States acquired for a modest sum an 8.6 acre plot of land in Wellfleet, Massachusetts, as part of the creation of the Cape Cod National Seashore. Remote descendants of a man who owned the property until his death in 1873 now seek to overturn a 1964 state court judgment clearing title in favor of the United States' predecessor in interest. The federal district court held the state judgment valid and the descendants now appeal.

The complex facts are set forth in three different places: the district court's original decision resolving the case in the government's favor on statute of limitations grounds, *Lombard v. United States*, 28 F.Supp.2d 44 (D.Mass.1998) ("*Lombard I* "); our own decision remanding the matter for further proceedings, *Lombard v. United States*, 194 F.3d 305 (1st Cir.1999) ( "*Lombard II* "); and the district court's second decision now under review, which again decided in the government's favor based on the 1964 state judgment, *Lombard v. United States*, No. Civ.A.97-10725-PBS, 2002 WL 1998245 (D.Mass. Aug.28, 2002) ("*Lombard III* ").

We therefore content ourselves here with a very short summary of facts needed for this new appeal. When Thomas

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*Of the District of Columbia, sitting by designation.

Lombard died in 1873, the property went to his five children. Two of the heirs made a conveyance to George Higgins in 1924, possibly claiming that they owned the whole parcel; in any event Higgins thereafter claimed the whole and sought a Massachusetts Land Court judgment to that effect in 1935; that case was ultimately dismissed without prejudice. The five children of Thomas Lombard are deceased, but a profusion of remote descendants exist in various locations around the country.

In 1962, the United States bought the property from Higgins for $13,500 but withheld payment until title was cleared. In 1963, Higgins began a quiet title action in the Barnstable County Superior Court, claiming not only title by deed but also by adverse possession. At this point none of the Lombard descendants lived on the land—it was undeveloped save for a family cemetery—and none were listed in Wellfleet tax records or local land office records as an owner or claimant to the property.

Although the complaint called for service upon Thomas Lombard and others, including his "heirs, devisees, or appointees," the sheriff made a return certifying that he had made a "diligent search" for Thomas Lombard and his "Agent or Attorney" but found no one (Thomas Lombard being, at this point, long dead). The sheriff is no longer alive and no one knows exactly whom he searched for or in what manner. What is clear is that the court did not rest its jurisdiction simply upon this faulty return.

Under Massachusetts law governing quiet title actions, "[i]f in such action the court finds that actual service cannot be . . . made upon a defendant," the court may direct notice be given by posting on the land, or newspaper publication, or both to constitute "constructive service on all the defendants." Mass. Gen. Laws ch. 240, § 7 (2002). Notice of the suit was given by publication in a local Cape Cod newspaper in

October and November 1963, and by posting notices in the Barnstable County Registry of Deeds and on the property itself. Personal service was made on three individuals on abutting property.

In addition, Massachusetts law provides that if despite such notice the court thinks that there may be defendants who have not been reached, it may *sua sponte* or on motion "appoint a guardian *ad litem* or next friend of any such defendant." Mass. Gen. Laws ch. 240, § 8. Higgins died while the quiet title suit was pending, and Higgins' wife Katherine was substituted for him in the suit. In response to Katherine Higgins' request, the court appointed a guardian *ad litem*, James Quirk, to represent unascertained and unknown potential claimants to the property.

Quirk reported that he had investigated the matter, including the title searcher's report, the title records in the county registry, and the county probate reports, and that he could discover no one else entitled to notice. The probate records were pertinent because a claim to the land did not appear in the probate inventories of any of the three Lombard children who did not join in the 1924 conveyance—and the current plaintiffs' claims rest entirely on the claims of these ancestors. It is unclear whether Quirk searched Wellfleet tax records to see if any of the descendants paid taxes on the property, but it appears that he would have found nothing, since none of them did.

The Massachusetts statute provides that if notice is given by posting or publication and the possible appointment of a guardian *ad litem*, then "the court may proceed as though all defendants had been actually served with process." Mass. Gen. Laws ch. 240, § 10. It then further provides: "Such action shall be a proceeding in rem against the land, and a judgment establishing or declaring the validity, nature or extent of the plaintiff's title may be entered, and shall operate directly on

the land and have the force of a release made by or on behalf of all defendants of all claims inconsistent with the title established or declared thereby." *Id.*

Following Quirk's report, which appended significant evidence in support of Higgins' adverse possession claim, the court entered a final decree in August 1964, confirming title in Higgins' wife save for a reservation of the Lombards' ownership of the burial plot and an easement to access it. The court's ruling also stated that notice was given to all interested parties and that a guardian *ad litem* had reported to the court. The government then paid Higgins' wife for the property and proceeded to incorporate it into the Cape Cod National Seashore.

Over thirty years later, in April 1997, a number of Thomas Lombard's descendants brought the present action to partition the property, claiming as descendants of the three children of Thomas Lombard who had not joined in the 1924 sale. Given the number of descendants, each plaintiff's share of the alleged 60 percent interest in 8.6 acres is small. But, of course, the value of choice Cape Cod property has likely much increased in the intervening period.

These claims might well be defeated by the adverse possession defense, but the government sought to defend its title without resort to a trial. It first invoked a twelve-year statute of limitations on quiet title actions against the United States, 28 U.S.C. § 2409a(g) (2000), and initially prevailed, *Lombard I*, 28 F.Supp.2d at 48-50. When we vacated this judgment, we said that summary judgment might still be appropriate based on the 1964 quiet title decree. *Lombard II*, 194 F.3d at 312. On remand, the district court so found, *Lombard III*, 2002 WL 1998245, at *8, and the descendants now appeal for a second time.

For the most part, this case is highly idiosyncratic and the district court's opinion is lucid and carefully considered. In such a case we might ordinarily affirm summarily on the well-reasoned decision of the district judge. But one facet of the matter is difficult and may have some precedential value. We confine our discussion to that issue, namely, whether the notice given under the Massachusetts statute was an adequate basis for the 1964 judgment.

The 1964 decree is a formal, final judgment issued by a state court clearing title in favor of the United States' predecessor in interest. It binds a federal court under the full faith and credit statute, 28 U.S.C. § 1738 (2000), unless the judgment itself is void. The burden of showing that it is void " 'rests heavily' " upon those who challenge the judgment. *Cook v. Cook*, 342 U.S. 126, 128, 72 S.Ct. 157, 96 L.Ed. 146 (1951) (quoting *Williams v. North Carolina*, 325 U.S. 226, 234, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945)). The plaintiffs claim that the state court did not give notice of the action to the Lombard descendants sufficient to meet minimum due process standards.

Individual service of the papers that initiate a case normally constitutes the required "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Where the name and address of the person who holds an interest in the property is known, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

But less reliable means of notice suffice where reasonable in the circumstances, *e.g.*, where claimants are hard to ascertain or their addresses are unknown. *See Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. 2706. In *Mullane*, 339 U.S. at 317,

70 S.Ct. 652, the Supreme Court said: "[I]n the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." The typical secondary means include notice by publication and posting. *See, e.g.*, Mass. Gen. Laws ch. 240, § 7 (2002). Both methods were employed here, together with a personal search by the sheriff and, thereafter, a further records search by the guardian *ad litem*.

The plaintiffs assert that Higgins—the person who instigated the 1963-64 quiet title action—knew that there were some descendants of Thomas Lombard living in Wellfleet who might claim an interest in the property, and Higgins deliberately chose not to give them personal notice. The evidence as to this is murky and was discounted by the government; but the district court accepted the possibility. So we will assume *arguendo* that the factual issue might bar summary judgment—if it were decisive. We conclude that in this case it is not.

There is a strong public interest in fostering a regime by which titles can be traced and relied upon. *Mullane*, 339 U.S. at 313-14, 70 S.Ct. 652. In this case, the state court that decided the quiet title action went through an elaborate process designed to determine that claimants with possible adverse interests were sought out and given the best notice available in the circumstances. As already described, this included not only notice by posting and publication, but also (apart from the search by the sheriff) the appointment of a guardian *ad litem* who made his own record search for possible claimants and reported back to the court. The court accepted the search as sufficient.

The state court thus did everything that it reasonably could to establish its jurisdiction, and the objective circumstances supported the state court's authority to enter a

final judgment quieting title to the property. If there had been other records giving the names and locations of other possible claimants, the sheriff or guardian *ad litem* would likely have found them; but neither did. In these circumstances, a state court judgment should not be held "void" based on speculations many years later as to Higgins' private knowledge at the time.

Leading cases like *Mullane* contain general statements that notice by posting or publication only suffices where claimants are otherwise unknown and cannot be personally served. *Mullane*, 339 U.S. at 318, 70 S.Ct. 652. But typically these cases involved statutes that purported to allow jurisdiction by posting or publication without regard to whether the claimants could be found; and none of them involved a situation in which a state court, in addition to notice by posting and publication, appointed a guardian *ad litem* and reasonably determined on the basis of objective evidence that individual claimants were unknown and could not be personally served. Where a state has adopted and followed a scheme as protective as that used in this case, we think the resulting judgment should not be invalidated by a different court even if a party to the original action wrongfully withheld private knowledge from the court.

Were Higgins alive today and claiming ownership for himself, he might well be estopped from relying upon the quiet title judgment if he wrongly procured it. *Cf. InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir.2003). Similarly, the court that entered the judgment might, if a timely request had been made, have considered a motion to reopen its own judgment based on fraud, new evidence or the like. *Cf.* Fed.R.Civ.P. 60(b). Neither possibility applies here.

A word should be said about *United States v. 125.2 Acres of Land*, 732 F.2d 239 (1st Cir.1984). There, the government took a small parcel of Cape Cod land by eminent

domain, knowing that one Matthew Jaeckle had a claim to a part of it and lived in Nantucket. Although he was listed in the telephone book, the government did not send him notice but published notice in a local paper and posted a sign somewhere on the 125 acre tract (apparently not on Jaeckle's portion). The district court condemned the land in 1947 and later in 1952 valued the land, closing the case but reserving "leave to reinstate for cause shown upon application of any interested party." *Id.* at 241.

Thereafter Jaeckle learned of the condemnation and in 1972 sought to reopen, alleging that he had been given insufficient notice and that the true value at time of condemnation was much higher than the amount he was allotted. This court declined to upset the condemnation but remanded to permit Jaeckle to contest the value as of 1947, pointing out that the government had known of Jaeckle's interest and general location, and could easily have found him listed in the telephone book.

*125.2 Acres* involved our reopening a federal district court proceeding that had only been half closed (given the reservation); the reopening was based on objective evidence that the government could have easily given personal notice to a known record owner. Nothing in the opinion indicates that the panel would have declared void the final judgment of a sister jurisdiction when it was reasonably entered after the appointment of a guardian *ad litem* and a formal determination that all feasible notice had been given. We see no conflict with *125.2 Acres*.

The descendants make a further and wholly different attack upon the 1964 judgment. In a nutshell, they say that the earlier action in the Massachusetts Land Court was not technically dismissed until the 1970s, and this deprived the Superior Court of authority to entertain the quiet title action. The argument is highly technical, rests on peculiar facts, and

is not of general interest. On this issue we are content to rely entirely on the discussion by the district court.

*Affirmed.*

# United States Court of Appeals
## For the First Circuit

No. 03-1430

EDWARD E. LOMBARD; ASA P. LOMBARD, III; EDITH LOMBARD CASSICK; RUTH LOMBARD GOURLEY; FLORENCE LOMBARD BROWN; BARBARA LOMBARD BAN-UK; SUSAN LOMBARD BLACK; ALTON HORTE; CARLETON G. SMITH; BARBARA E. BAINES; VIRGINIA H. HART

Plaintiffs - Appellants

V.

UNITED STATES

Defendant - Appellee

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch,
Lipez and Howard, Circuit Judges,
Oberdorfer*, Senior District Judge

ORDER OF COURT

Entered: April 2, 2004

The petition for rehearing having been denied by the panel of judges who decided. the casē and the petition for rehearing en banc having been submitted to the active judges

of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for hearing and petition for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: MARK R. SYSKA

Chief Deputy Clerk.

[ CC: Messrs. Allen and Schmidt]

*of District of District of Columbia, sitting by designation

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

Case No. 15855 Registration

George K. Higgins

*vs.*

ORDER FOR DISMISSAL

It is hereby ORDERED that the petition in the foregoing case, having been marked inactive on June 4, 1957, and no action having been taken since that time, be dismissed under Rule 85 of the Superior Court (see Land Court Rule VI), without prejudice.

By the Court,

Attest:

*Recorder*

Dated: June 5, 1958

## HOME TITLE GUARANTY COMPANY

**PRELIMINARY CERTIFICATE AND BINDER No.** EE-12400-25W-4011

Application of DEPARTMENT OF INTERIOR - NATIONAL PARK SERVICE
(Name of attorney or firm applying) for

owner's $ (To be determined)
lessee's $ _____
mortgagee's $ _____

policy insuring UNITED STATES OF AMERICA
(Name of party to be insured)

---

HOME TITLE GUARANTY COMPANY certifies that the title to the premises described in Schedule A, subject to the encumbrances and defects noted in Schedule B, in insurable at this date on a valid conveyance, lease or mortgage by GEORGE HIGGINS who acquired title by deed from DAVID C. LOMBARD and MARY M. COBB dated September 8, 1924, and recorded October 31, 1924, in Book 410 at page 80 of the Barnstable, Massachusetts, Land Records, and from ELIZABETH F. COLLINS by deed dated June 30, 1925, recorded December 1, 1925, in Book 427, Page 483, of the Barnstable, Massachusetts, Land Records.

### SCHEDULE A

*(Legible copies of property description, initialed by examining counsel, may be appended.)*

ALL that certain piece or parcel of land situated in the Town of Wellfleet County of Barnstable and State of Massachusetts, more particularly described as follows:

SEE SCHEDULE A ATTACHED HERETO.

## SCHEDULE B

[TEXT OMITTED]

ADD BELOW, OR IN ADDENDA, ALL ADDITIONAL EXCEPTIONS SHOWN BY TITLE EXAMINATION.

I. Persons claiming under the Heirs of Thomas Lombard except as to David C. Lombard and Mary M. Cobb, there being no probates for such persons listed as heirs at the time the Will of Thomas Lombard was probated in Barnstable County in 1867.

J. The Lombard Burial ground, so-called, which forms a portion of the premises.

[TEXT OMITTED]

Executed this 10th day of January, 1963

Countersigning Agent: /a/

HOME TITLE GUARANTY COMPANY

Represented by: /s/
Authorized Agent

COMMONWEALTH OF MASSACHUSETTS
BARNSTABLE, SS. SUPERIOR COURT
EQUITY NO.

GEORGE K. HIGGINS

vs.

THOMAS LOMBARD, His Heirs and Devisees
GARDNER JENKS
FRANK H. REMICK
JOHN HUGHES HALL

BILL IN EQUITY TO ESTABLISH AND CONFIRM TITLE

1. Respectfully represents George K. Higgins, of Brookline, that he is the owner of a certain parcel of land situated in that section of the Town of Wellfleet, County of Barnstable, Commonwealth of Massachusetts, known as Bound Brook Island, more particularly shown as "Lot 3" on a plan filed with the Land Court In Boston, with Land Registration Case No.15795-A a copy of a portion of which plan is filed with Barnstable County Registry of Deeds with Certificate No. 3733, and which plan is attached hereto and made a part hereof.

2. That such parcel of land was severed from the Registration proceedings in said Land Court Case No. 15795 and was assigned by the said Land Court the Number of 15855., Registration and that the Registration petition was dismissed without prejudice by the Court under Rule 85 of the Superior Court on June 5, 1958;

3. That the Petitioner obtained his title to the said premises by a Warranty Deed from David C. Lombard and Mary M. Cobb dated September 8, 1924, recorded October 31, 1924 with the Barnstable County Registry

of Deeds in Book 410, Page 80 and by open, continuous and adverse use and possession for a period In excess of thirty-eight years;

5. That the Petitioner believes and therefore avers that the said land as shown as Lot 3 on Land Court Plan 15975-A fairly represents and delineates the property to which he claims title.

5. That the said deed to the Petitioner states that the premises were formerly owned by Thomas Lombard and that the said Thomas Lombard died in the year 1872 In South Truro, Barnstable County, Massachusetts without a Will and that his estate has never been probated and that the inscriptions In the Lombard Burial Lot which is situated on a portion of the premises conveyed by the aforesaid Deed to the Petitioner indicates that the Thomas Lombard was survived by Benjamin F. Lombard and Richard S. Lombard as well as by David C. Lombard and Mary M. Cobb and that both Benjamin F. Lombard and Richard S. Lombard died prior to 1924 intestate and there are no Probates for either of the said Benjamin F. Lombard, or Richard S. Lombard.

6. Your petitioner believes and therefore avers that the sole heirs of said Benjamin F. Lombard and Richard S. Lombard were David C. Lombard and Mary M. Cobb from whom he acquired his title by the aforesaid Warranty Deed. That the premises covered by said Deed is supposed to be the land that Thomas Lombard abandoned when he moved from Bound Brook Island to South Truro around-the. year 1870 and that no prior deed can be found of record by which the premises can be checked.

7. That the only encumbrance on the title to said premises is the aforementioned Burial Lot of the Lombard Family and a right of way to it from the public road.

8. The Petitioner believes and therefore avers that the names and addresses of the persona who claim to own land abutting on said premises are:—

Gardner Jenks, 1519 Bolton Street, Baltimore, Maryland
Frank H. Remick, Wellfleet, Massachusetts
George K. Higgins, 1318 Beacon Street, Brookline, Mass.
United States of America, Cape Cod National Seashore, P.O. Box 222 Eastham, Massachusetts
John Hughes Hall, Wellfleet, Massachusetts.

9. That your Petitioner desires to have his title to the said premises conveyed to him the said deed from David C. Lombard and Mary M. Cobb dated September 8, 1924 recorded with Barnstable County Registry of Leeds In Book 410 Page 80 and shown as Lot 3 on Land Court Plan 15975-A established and confirmed and. that proceedings may be had against said defendants and against all such unknown persons as may have any interest in said land without naming them as provided by General Laws (Ter. Ed.) Ch. 240, Secs. 6 - 10 inclusive, and in accordance with the General Equity Power and procedure of this Court.

WHEREFORE, your Petitioner prays this Honorable Court to:

(A) Order citation be served on said "defendants by Registered Mail and by publication and as against all persons unknown, unnamed, unascertained or not in being, that citation be served on them in general terms by publication on one or more newspapers as the Court may determine;

(B) Order, adjudge and Decree that said. George K. Higgins is the owner in fee of all the land as described therein and shown on said plan recorded with the Land Court in Boston as Plan No. 15975-A and that his title be determined, confirmed and 'quieted In him and in his heirs and assigns forever, subject only to the said rights of the Lombard family in the Burial Lot on said premises' and a right of way for access thereto.

(C) That all said apparent defects, imperfections or claims upon the title to said land be forever removed and that the Petitioner's title and possession of the land aforesaid be decree firm and effectual and in fee, forever, subject only to the rights of the Lombard Family in and to the Burial Lot on said premises and a right of way to said Burial Lot from the Public flood over said remaining land of George K. Higgins.

(D) That the defendants whether named, or unnamed, herein be fore barred, stopped and enjoined from having or claiming any right, title or interest in or to said land and buildings thereon, adverse to the Petitioner, his heirs, devisees, grantees and assigns.

(E) And for such other and further action and relief as to the Honorable Court may seem just and proper,

GEORGE K. HIGGINS, Petitioner
By his Attorney,

/s/
Maughton E. Sanguinetti

No. 27434

GEORGE K. HIGGINS

vs.

THOMAS LOMBARD, His Heirs and Devisee, et al

SUBPOENA

Returned with Service

SUPERIOR COURT
BARNSTABLE, SS.
FILED OCT 9 1963
Barbara Holmes Neil
*Clerk*

From the office of:
Haughton E. Sanguinetti
97 Pin Oak Way
Falmouth, Massachusetts

Commonwealth of Massachusetts

BARNSTABLE, SS

To THOMAS LOMBARD; GARDNER JENKS of Baltimore, State of Maryland; FRANK H. REMICK of Wellfleet, Barnstable County, Massachusetts; JOHN HUGHES BALL of Well-fleet, Barnstable County, Massachusetts, UNITED STATES OF AMERICA, CAPE COD NATIONAL SEASHORE, of Eastham, Barnstable County, Massachusetts; or their heirs, legal representatives, or such persons as shall become their heirs, devisees, or appointees

GREETING.

WHEREAS a suit in equity has been begun against you in our Superior Court by GEORGE K. HIGGINS of Brookline, Norfolk County, Massachusetts, under the provisions of General Laws (Ter. ed.) Chapter 240, sections 6 to 10 inclusive, to quiet or establish and confirm title to land in Wellfleet, Barnstable County, Massachusetts, being conveyed to said plaintiff by a Warranty Deed from David C. Lombard and Mary M. Cobb, dated September 8, 1924, and recorded October 31, 1924, with the Barnstable County Registry of Deeds in Book 410, Page 80, and more particularly shown as "Lot 3" on Land Court plan No. 15795A filed with Barnstable County Registry of Deeds with Certificate No. 3733.

WE COMMAND YOU, if you intend to make any defense, that on the first Monday of May next, which day is the return day of this subpoena, or within such further time as the law allows, you do cause your written appearance to be entered and your written answer or other lawful pleading to be Bled in the office of the clerk of said court at Barnstable, in said county first above named, and further that you defend against said suit according to law, if you intend to make any

defense, and that you do receive what the court shall order, adjudge and decree therein.

Hereof fail not, at your peril, as otherwise said suit may be adjudged, and orders and decrees entered therein in your absence.

Witness, G. JOSEPH TAURO Esquire, Chief Justice of our Superior Court the sixteenth day of October in the year of our Lord one thousand nine hundred and sixty-three.

/s/_____ Clerk

COMMONWEALTH OF MASSACHUSETTS

Barnstable ss: October 24, 1963

I hereby certify under the penalties of perjury, that I did on this day post up an attested copy of this subpoena in the Barnstable County Registry of Deeds, Barnstable, Mass., as within-directed.

And afterwards on the same day I did give Notice to the within-named Defendant United States of America, Cape Code National Seashore, by delivering in hand to Ernest Goodale, its Legal Officer, and the person in charge of its business a true and attested copy of this subpoena.

And afterwards on the 25th day of October 1963 I did cause to be published in The Cape Code Standard Times, as within-directed, for three successive weeks, namely October 25, November 1, and November 5, 1963 a true and attested copy of this subpoena.

And afterwards on the 19th day of November 1963 I did post up, as within-directed, on the within-named subject property a true and attested copy of this subpoena.

And afterwards on the same day I did make diligent search for the within-named Thomas Lombard, Gardner Jenks, Frank H. Remick, and John Hughes Hall, and for their last and usual place of abode, Agent or Attorney but I have not been able to find either withinx my precinct and I return this precept to Court without service upon Them.

/s/
Deputy Sheriff

COMMONWEALTH OF MASSACHUSETTS
Barnstable, ss:

TO ALL WHOM IT MAY CONCERN, and to THOMAS LOMBARD, GARDNER JENKS of Baltimore, State of Maryland, FRANK H. REMICK of Wellfleet, Barnstable County, Massachusetts, JOHN HUGHES HALL of Wellfleet, Barnstable County, Massachusetts, UNITED STATES OF AMERICA, CAPE CODE NATIONAL SEASHORE, of Eastham, Barnstable County, Massachusetts, or their heirs, legal representatives, or such persons as shall become their heirs, devisees, or appointees, or any persons claiming under them and to persons unknown: DEFENDANTS

WHEREAS a suit in equity has been presented by said Court by GEORGE K. HIGGINS of Brookline, Norfolk County, Massachusetts, PLAINTIFF, under the provisions of General Laws (Ter. Ed.) Chapter 340, Sections 6 to18 inclusive, to quiet or establish and confirm title to land in Wellfleet, Barnstable County, Massachusetts, being conveyed to said plaintiff by a Warranty Deed from David C. Lombard and Mary M. Cobb, dated September 8, 1934, and recorded October 31, 1934, with the Barnstable County Registry of Deeds in Book 410, Page 80, and more particularly shown as "Lot 3" on Land Court

plan No. 25793A filed with Barnstable County Registry of Deeds with Certificate No. 3733.

WE COMMAND YOU if you claim or may claim by purchase, descent, or otherwise any right, title, interest, or estate in said land which is the subject of said suit and if you intend to make any defense, that on the first Monday of May next, which day to the return day of this notice, or within such further time as the law allows, you do cause your written appearance to be entered and your written answer or other lawful pleading to be filed in the Office of the Clerk of said Court at Barnstable and further that you defend against such suit according to law, if you intend to make any defense, and that you do receive what the Court shall order, adjudge, and decree therein:

AND IT APPEAR to the Court by suggestion of the plaintiff that there may be persons unascertained, not in being, unknown, or who cannot be served with process or made personally amendable to the decree of the Court,

IT IS ORDERED by the Court that the plaintiff give notice to the resident defendants by service of subpoena by officer qualified to serve process/give notice to the defendants by causing an attested copy of this order to be published three times in different weeks in the CAPE CODE STANDARD TIMES, if newspaper publisher in Hyannis in said County, such service to be completed not later than four months before the said first Monday

of May next, give notice to the non-resident defendants by mailing a copy of the subpoena, post-paid, by registered mail, and by posting a copy of this order on the premises and in the Barnstable County Registry of Deeds.

Hereof fail not, at your person, so otherwise said suit may be adjudged, and orders and decrees entered therein, in your absence.

Witness, G. Joseph Tauro, Esquire, Chief Justice of our Superior Court, the sixteenth day of October in the year of our Lord one thousand nine hundred and sixty-three.

A true copy attests:

/s/ BARBARA HOLMES NEIL, Clerk

10/23-11/1, 8/63.

COMMONWEALTH OFMASSACHUSETTS
BARNSTABLE, SS SUPERIOR COURT
IN EQUITY
No. 27434

KATHERINE F. HIGGINS,

Petitioner

vs.

THOMAS LOMBARD, His Heirs and
Devisees, et a1.,

Respondents

FINAL DECREE

On the Petition of George K. Higgins, of Brookline, Katherine F. Higgins, of Brookline, having been substituted as Petitioner, on Motion duly allowed by the Court, against Thomas Lombard, His Heirs and Devisees, Gardner Jenks, Frank H. Remick, John Hughes Rail and United States of America, Cape Cod National Seashore, Respondents;

It appearing that notice according to the Order has been given—to all parties interested and that James H. Quirk the Guardian ad Litem appointed by the Court to represent the Respondents unascertained, unknown, out of the Commonwealth and/or not in being, or who cannot be served with process or made amenable to the Orders of this Court, having made an investigation and search and reported to the Court;

After hearing and consideration, the Court orders and decrees:—

1. That the said Katherine F. Higgins, of Brookline, Norfolk County, Massachusetts, the Substituted Petitioner., is the owner in fee of all of—the land described in said Petition, to-wit:—

A certain parcel of land situated in that section of the Town of Well-fleet, County of Barnstable, Commonwealth of Massachusetts, known as Bound Brook Island, more particularly shown as "Lot 3" on a plan filed with the Land Court in Boston, with land-Registration Case No. 15795-A filed with Barnstable County Registry of Deeds with Certificate No. 3733.

That the above described premises are established by the Court to be free and clear of all liens and encumbrances except the rights of the Lombard family in the Burial Lot on said premises and a right of way for access thereto from the public road over the remaining land of said Katherine F. Higgins;

2. That the named Respondents and any person claiming by, through or under them, and all persons interested therein who may or do claim any interest therein, are hereby forever barred from having or enforcing any claim or claims adverse to the said Substituted Petitioner, her heirs, devisees, grantees or assigns, in said land.

By the Court,

/s/

Entered:— Aug. 20, 1964

A true copy, Attest: /s/
Clerk

THE COMMONWEALTH OF MASSACHUSETTS

LAND COURT

SUFFOLK, ss

CASE NO. 15855

George K. Higgins

PETITIONER

JUDGMENT OF DISMISSAL

It is hereby ORDERED that the petition in the foregoing case by dismissed by Order of Court, for lake of prosecution.

By the Court, (RANDALL, J.)

Attest:

/s/
JEANNE M. MALONEY
DEPUTY *RECORDER*

Dated: November 1, 1976

IN THE UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| EDWARD E. LOMBARD; | ) | |
| ASA P. LOMBARD, III; | ) | |
| EDITH LOMBARD CASSICK; | ) | |
| RUTH LOMBARD GOULEY; | ) | |
| FLORENCE LOMBARD BROWN; | ) | |
| BARBARA LOMBARD BANUK; | ) | |
| SUSAN LOMBARD BLACK, and | ) | |
| ALTON HORTE, | ) | |
| | ) | |
| Plaintiffs, | ) | CIVIL ACTION |
| | ) | NO. 97-10725-PBS |
| -v- | ) | |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |

THE ORAL DEPOSITION OF EDITH LOMBARD CASSICK, held pursuant to Notice, and the applicable provisions of the Federal Rules of Civil Procedure, before Jody Perkins, a Court Reporter and Notary Public, within and for the Commonwealth of Massachusetts, at the offices of the U.S. Attorney, Post Office and Courthouse, Boston, Massachusetts, on Friday, February 27, 1998, commencing at 11:30 o'clock a.m.

*******

property. I can't seem to find it.

Q Did George Higgins try to get your father, Arthur Lombard, to sign a deed to him, George Higgins?

A Yes.

Q And, your father refused?

A Right. This is long after the fact. It was probably --I don't know when it was. I think it was after my father retired, to be honest with you, but I'm not sure. Probably, as the seashore was coming in.

Q Now, you say you've visited this property five to six times a year.

A Yeah.

Q Have you ever seen any signs on the property indicating that the government claimed to own it? Right on the property, itself.

A Well, on the property, they had put a fence and a gate with a lock.

Q Yes. About a quarter of a mile to the south, correct?

A Yeah.

Q I mean directly on the eight or 15 acres in question, has the government ever posted it saying it's government property?

A No.

Q And, relative to just the land we're talking about now, the Thomas Lombard land, were you or your father ever

*******

Q Did your father claim an interest in this property?, Well, when he found out about it, yes. I'm sure -Well, when he found out that my great uncle David had sold it- -

Q But, your father never gave up his claim to this property.

A No. No. No.

MR. HALLISEY: Okay. Thank you. No further questions.

EXAMINATION BY MS. SCHRAGER:

Q Mrs. Cassick, when you said that Mr. Higgins tried to persuade your father and your uncles to sell the property to him, what are the names of your uncles?

A Asa Payne Cobb Lombard and Everett Wesley Lombard. I don't know if my uncle's name was Wesley or Edward. I think it's Wesley.

Q And, when do you think those conversations occurred?

A Oh, boy. I'm not quite sure.

Q Would they have occurred before 1980?

A Oh, yes.

Q Before 1970?

A It was probably -- It was probably in the '60s. Maybe, in the '50s, after my grandmother died, and my father got the house down the Cape.

Q Mrs. Cassick, I'm going to give you two photos and I'd